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Supreme Court, U.S.
FILED

No. 95 30 JUL 3 1995

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1994

RICHARD L. FISHELL
and
DOROTHY M. FISHELL

Petitioners

vs

ROBERT SOLTOW
and
ROSALEE SOLTOW
and
JOHN A. PORTER, Trustee

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX VOLUME II

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Counsel for Petitioners

216pp

Release and Settlement Agreement

This Agreement is made this 12th day of June 1992, by and between Robert and Rosalee Soltow, Michigan residents, whose address is 13665 Tallman Road, Eagle, Michigan 48822 (the "Soltows"), and John A. Porter, Trustee of the Estate of Richard L. and Dorothy M. Fishell, Debtors ("Fishells"), Bankruptcy Court Case No 90-85144, whose address is 622 Commerce Building, 5 Lyon Street, N.W., Grand Rapids, Michigan 49503-3122 ("Trustee")("Agreement")

Recitals

A. In 1986, the Fishells borrowed money from the Soltows. The Fishells gave the Soltows a promissory note and mortgage to secure the loan made by the Soltows ("1986 loan"). The real estate described in Exhibit A was given by the Fishells to the Soltows as security for repayment of the loan ("the property").

B. After defaulting on payment of the 1986 loan, the Fishells and the Soltows entered into an amended promissory note, mortgage modification agreement and escrow holding agreement in August 1988 ("1988 loan documents"). The 1988 loan documents superseded the 1986 loan. The loan documents provided that the Soltows would not foreclose immediately but gave the Fishells until February 15, 1989 in which to make payment.

C. The 1988 loan documents required the Fishells to execute and deliver a deed to the property to an escrow agent, Lawyers Title Insurance Corporation. The 1988 loan documents further provided that if the amount owed by the Fishells was not paid on time then the escrow agent was required to release to the Soltows the warranty deed conveying the property to them.

D. The Fishells never paid the Soltows and the escrow agent delivered the warranty deed in March 1989 to the Soltows, who then recorded the deed to the property on March 16, 1989.

E. On April 27, 1989, the Fishells sued the Soltows in Eaton County Circuit Court, Case No 89-366-CH, seeking to cancel the warranty deed and seeking other relief. The Fishells also filed a lis pendens against the property. The Soltows filed a counterclaim against the Fishells on June 12, 1989 alleging slander of title. This lawsuit is referred to as the "Eaton County Lawsuit".

F. On November 16, 1990 the Fishells filed bankruptcy seeking protection under Chapter 11 of the United States Bankruptcy Code. Initially the Fishells were permitted to stay in possession of their property.

G. On December 12, 1990, the Fishells made application to the Bankruptcy Court to remove the Eaton County Lawsuit to the Federal Bankruptcy Court as part of the

Chapter 11 proceedings. The Bankruptcy Court authorized the removal and the Eaton County Lawsuit became Adversary Proceeding No 91-8015 ("Adversary Proceeding").

H. Upon motion of the United States Trustee and certain creditors, on January 13, 1992, the bankruptcy court, following a hearing on the motions for conversion of the Chapter 11 to Chapter 7, ordered the conversion of the Chapter 11 proceedings to Chapter 7 liquidation. Thereafter, the Trustee was appointed to administer the Chapter 7 proceedings.

I. The Soltows and the Trustee have agreed to settle all disputes arising out of the Eaton County Lawsuit and the Adversary Proceeding (collectively the "Lawsuit") on the terms and conditions contained in this Agreement.

Now, therefore, in consideration of the mutual promises and agreements made in this Agreement and intending to be legally bound, the parties agree as follows:

1. Approval of Bankruptcy Court. The Trustee and the Soltows agree that this Agreement (except for the provisions of this paragraph 1) shall become effective only if the Bankruptcy Court enters an order approving it on or before the 10th day of July 1992 ("Approval"). Trustee and the Soltows agree to use their best efforts to obtain the Approval as soon as reasonably possible. The Soltows agree not to sell, convey or transfer the Property or any interest in the Property until the entry of the Bankruptcy Court's order approving this Agreement.

2. Dismissal of the Lawsuit. Trustee shall cause the Lawsuit to be dismissed with prejudice and without costs to either party. At the Soltow's request, the Trustee shall promptly cause any other documents they request to be executed in order

to more fully effectuate the dismissal of the Lawsuit and termination of the lis pendens. The order of dismissal shall be substantially in the form of attached Exhibit 1. The Soltows shall cause their counterclaim made in connection with the Lawsuit to be dismissed with prejudice and without costs to either party. The order of dismissal shall be substantially in the form of attached Exhibit 2.

3. Mutual Release and Discharge of Claims. For and in consideration of the provisions of this Agreement, the Soltows release and forever discharge the Trustee and the Fishells, together with, to the extent applicable, their agents, officers, employees, attorneys, affiliated organizations and insurers, from any and all claims, demands, equitable relief, damages, costs, expenses, administrative actions and cause of action of any kind or character which now exists or may later arise which were

known or should have been known by the parties relating in any matter to or arising from or which could have arisen from the Lawsuit, except as provided in the terms of this Agreement. Anything in this Agreement to the contrary notwithstanding, the Soltows are not waving any claim they may have against the Fishells or the Trustee with respect to determination of the Soltows' interest in the real estate legally described in attached Exhibit B (the "Andre property") and in connection with the purchase at foreclosure sale, or the alleged redemption of the Andre property. The Trustee and the Soltows agree that this Agreement shall not act as a bar or waiver of the Soltow's claim of ownership of the Andre property. All other claims against the Trustee and the bankruptcy estate shall be considered released by the Soltows pursuant to this Agreement.

The Trustee forever discharges the Soltows, together with, to the extent applicable, their agents, assigns, officers, employees, attorneys, affiliated organizations and insurers, from any and all claims demands, equitable relief, damages, costs, expenses, administrative actions and cause of action of any kind or character which now exists or may later arise which were known or should have been known by the Fishells or by Trustee, relating in any matter to, or arising from, or which could have arisen from the Lawsuit or related occurrences pertaining to the Property, except as provided in this Agreement.

4. Indemnification. Each party agrees to indemnify the other against any and all cost, loss and expense, including attorneys fees, which may be incurred as a result of defending any additional claim made by the other party arising out of the Lawsuit or any transaction involving the Property except that this indemnification shall not

apply to expenses incurred in connection with any appeal of the Approval of this Agreement.

5. Payment by the Soltows. The Soltows agree to pay the Trustee the sum of $2,000 within 30 days of the date on which the Approval is obtained.

6. Non-Admission of Liability. This Agreement shall not be construed as an admission nor is it an admission by either party or any of their officers, employees, agents or attorneys in any respect for any claim or causes of action which arose out of or could have arisen out of the Lawsuit or out of transactions involving the Property. Each party expressly denies any admission of liability to the other party. This Agreement is being entered into solely for the purpose of resolving and settling any and all of the claims that arose out of or could have arisen out of the Lawsuit or out of any transaction involving the property

in accordance with Paragraph 3.

7. Agreement as Defense. The parties fully understand and agree that this Agreement may be pled as a complete defense in any past, present or future claim of entitlement which has been released by this Agreement.

8. Attorney's Fees. The parties agree that nothing in this Agreement shall be interpreted to render any party liable for payment of the attorney's fees of another party, except as specifically provided in this Agreement.

9. Notices. All notices and other communications required or permitted under this Agreement shall be deemed to have been given if mailed by registered or certified mail, postage prepaid, or otherwise delivered by hand or messenger, to the parties at their addresses listed on page 1, or to such other changed address as such party may have given notice.

10. Applicable Law. This Agreement has

been executed, delivered and accepted at and shall be deemed to have been made in Lansing, Michigan and shall be interpreted and the rights and liabilities of the parties shall be determined in accordance with the laws of the State of Michigan.

11. Integration. This Agreement sets forth the entire agreement and understanding between the parties as to the subject matter hereof, and supersedes all prior discussions, representations, amendments or understandings of every kind and nature between them.

12. Amendments. Any amendment, alteration, supplement, modification or waiver shall be invalid unless it is set forth in writing, signed by the party intending to be bound thereby.

13. Severability. If any provision of this Agreement becomes or is declared by a court of competent jurisdiction to be illegal, unenforceable or void, this Agreement shall

continue in full force and effect without the provisions.

14. Assignability. This Agreement may not be assigned by any party without the prior written consent of the other parties.

15. Benefit. This Agreement shall be binding upon and inure to the benefit of the Soltows, the Fishells and the Trustee and their respective personal representatives, successors and assigns.

16. Captions. Captions contained in this Agreement are inserted for reference and in no way define, limit, extend or describe the Agreement or the intent of any provision herein.

17. Counterpart. This Agreement may be executed in one or more counterparts, each of which shall be enforeceable against the party actually executing such counterparts and all of which together shall constitute one instrument.

18. Pronouns. All pronouns and any vari-

ation thereof shall be deemed to refer to the masculine, feminine, neuter, singular or plural as the identity of the parties may require.

19. Construction of Agreement. The parties agree that this Agreement has been jointly drafted and neither party may assert an ambiguity in the construction of this Agreement against the other party because the other party allegedly drafted the alleged ambiguous provision.

20. Representations, Warranties and Agreements of the Soltows. For the purposes of inducing the Trustee to enter into this Agreement, they warrant that they have authority to enter into the Agreement and, once the Approval is obtained, the Agreement will be binding on them.

21. Representations, Warranties and Agreements of Trustee. For the purpose of inducing the Soltows to enter into this Agreement the Trustee represents that:

a. He is the duly appointed and acting trustee of the Fishells' Chapter 7 bankruptcy.

b. He has the power and sole authority to enter into the Agreement and, once the Approval is obtained, the Agreement will be binding upon him and the Fishells.

c. The Lawsuit is property of the bankruptcy estate and the Trustee, subject to court approval, has exclusive control over its disposition.

22. Voluntary Execution. The parties acknowledge that they have read the Agreement, that they understand its terms, and they have entered into it voluntarily. Further, the parties specifically acknowledge that they have met and conferred with their respective attorneys regarding the terms of the settlement and that their respective attorneys have advised them that this Agreement constitutes final resolution of any and all claims which they may have against one another.

In Witness Whereof, the parties have executed this Agreement on the date stated above.

___/s/_________________ Robert Soltow	__/s/_________________ John A. Porter, Trustee of the Estate of Richard L and Dorothy M. Fishell, Debtors
___/s/______________ Rosalee Soltow, by her attorney in fact	

(Omitted hereafter: Durable Power of Attorney of Rosalee Soltow, 2 legal descriptions of real estate noted in above Agreement, and proposed form of orders referred to as Ex 1 and 2 in above Agreement)

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF MICHIGAN

IN RE

RICHARD L. FISHELL and
DOROTHY M. FISHELL
Debtors

Case No 90-85144
Hon Jo Ann C. Stevenson

RICHARD L. FISHELL and
DOROTHY M. FISHELL

Chapter 11

Plaintiffs

vs

Adversary No 91-8015

ROBERT SOLTOW amd
ROSALEE SOLTOW

Defendants

FIRST AMENDED COMPLAINT

Plaintiffs, as debtors in possession, allege:

JURISDICTION

Jurisdiction of this court over this adversary proceeding is based upon 28 USC 1334 and 28 USC 157 in that this action is otherwise related to the Chapter 11, Title 11 case of Richard L. Fishell and Dorothy M. Fishell, debtors, filed 16 November 1990 and now pending before this Court, File No 90-85144. This is a non-core proceeding under 28 USC 157(c). Plaintiffs do not consent to the entry of final orders or judgments by the bankruptcy court in this action. However, Plaintiffs have filed a demand for jury trial and Plaintiffs would consent to the entry of final orders or judgments by the bankruptcy judge on all matters submitted to a jury. Plaintiffs have been duly appointed as debtors in possession, are qualified to so serve and are presently acting as such.

COUNT I

1. This is an action to cancel or rescind a deed to real property located in Eaton County, Michigan and for other relief.

2. That Plaintiffs are adults and

the grantors pursuant to the Warranty Deed which is the subject matter of this action. Said Warranty Deed, recorded in Liber 792 of Deeds, pages 198-199 on the 16th day of March 1989, is attached hereto as Exhibit "A".

3. That the Defendant, Robert Soltow, is an adult and the grantee under the aforesaid Warranty Deed, Exhibit "A". The Defendant, Rosalee Soltow, is, and was, the wife of the said Robert Soltow, and has, or may have, some interest in the property.

4. That prior to the recordation of the said Warranty Deed, Plaintiffs were the record fee owners of the premises described herein by virtue of a certain warranty deed recorded on the 14th day of July 1986 in Liber 707 of Deeds, page 627. A copy of said warranty deed is attached hereto as Exhibit "B".

5. That on or about the 7th day of

July 1986, Plaintiffs were engaged in the business of developing real property and, as mortgagors, executed and delivered to the Defendant, Robert Soltow, as mortgagee, a mortgage on the above premises, same having been recorded in Liber 707, page 630, Eaton County records.

6. That the amount of the loan from Defendant to Plaintiffs on or about July 7, 1986, that gave rise to the mortage mentioned in paragraph 5, was $350,000 at 15% interest per annum and a default interest rate of 20% per annum.

7. That Defendant Robert Soltow claims that Plaintiff Richard Fishell signed five additional notes, with Defendant, Robert Soltow as payee, from on or about April 23, 1982 through March 24, 1988. Defendant claims those notes were as follows:

a) Noted dated 4/23/82 ($10,625 principal amount) at 12 1/2 % interest per annum;

b) Note dated 1/29/86 ($6,250 principal amount) at 12 1/2 % interest pre annum;

c) Note date 7/16/87 ($25,000 principal amount) at 12% interest per annum;

d) Note dated 9/3/87 ($25,000 principal amount) at 12% interest per annum;

e) Note dated 3/24/88 ($55,000 principal amount) at 12% interest per annum.

8. That on or about August 25, 1988, Defendant Robert Soltow caused to be prepared the following:

a) an amended promissory note, allegedly combining the principal and interest due on the note of July 7, 1986 for $350,000 and the principal and interest due on the notes set forth in paragraph 7, supra. The total amount set forth in the amended note was in the amount of $610,446.14.

b) a mortgage modification agreement securing a larger principal sum.

c) an escrow holding agreement.

d) a declaration of storm drain easement over adjoining lands for the benefit of the property described in the mortgage and warranty deed at issue herein.

e) the warranty deed (attached hereto as Exhibit "A").

9. In order to induce Plaintiffs to execute the documents set forth in paragraph 8 a- e, Defendants made the following representations to Plaintiffs:

a) On August 12, 1998, Defendants notified Plaintiffs that Plaintiffs were in default on the $350,000 note to Defendant Soltow and under mortgage foreclosure Plaintiffs' redemption period would have expired the end of December, 1988; therefore, Plaintiffs would benefit from signing said documents;

b) That the public or people that Plaintiffs were dealing with on selling or developing the property would not have any notice of the dealings between Plaintiffs and Defendants, other than the mortgage from Plaintiffs to Defendant Robert Soltow which would be recorded;

c) Defendant represented to Plaintiffs that he just wanted his money repaid and there were verbal agreements that Plaintiff, Richard Fishell, would be allowed to treat the property as his own and to sell same without any hinderance from Defendant even after the February 15, 1989 date set forth in the escrow holding agreement.

10. Relying upon those representations, Plaintiffs signed the documents on August 25, 1988, with the understanding said documents were security on the monies owed by Plaintiffs to Defendant Robert Soltow.

11. The representations made by Defendants, as set forth in paragraph 9 a - c were false.

12. That Plaintiffs relied upon said representations in signing the documents on August 25, 1988.

13. That Plaintiffs were deceived by said representations to their detriment in that:

a) Plaintiffs believed that they were gaining additional time to sell and/or develop said property;

b) Plaintiffs believed Defendants would do nothing to hinder Plaintiffs' efforts;

c) Plaintiffs believed that Plaintiffs would be able to continue their efforts without hinderance even after February 15, 1989;

d) Plaintiffs believed Defendants were just taking the deed in escrow as security for the indebtedness;

14. That Plaintiffs were in privity with Defendants in the transactions of August 25, 1988.

15. Further, that the foregoing representations made by Defendants were false and known to be false when made.

16. Defendants did not intend, at the time of making the representations, and do not now intend to perform as agreed, as evidenced by:

a) The Defendant and his agent, from and after 25 August 1988, represented to others dealing with the property, including local government officials, that Plaintiffs need no longer be dealt with respecting same;

b) Defendants could not have foreclosed on the mortgage and had the redemption period expire by December 31, 1998;

c) Defendants caused to be filed on February 7, 1989, an affidavit prepared and signed by Douglas Austin advising the world that by February 15, 1989, Plaintiffs would have no interest in said property;

d) Attempting in April and May of 1989 to have Plaintiffs sign off on any verbal rights that Plaintiffs had to sell and/or develop said property;

e) Defendants took the position, in April and May of 1989, that they owned the property and did not wish to merely be repaid the indebtedness.

17. That contrary to the agreement and understanding of the parties, the aforesaid deed was recorded upon the public records of Eaton County, Michigan on March 15, 1989, and claimed to have vested absolute fee ownership in Defendant, Robert Soltow, at that time.

18. That the Defendant, Robert Soltow, asserts fee ownership of the property and has refused Plaintiffs' demands to either cancel the deed or reconvey.

19. That if the Defendants are allowed to assert title to said property, Plaintiffs will suffer losses which would result in unmerited benefits to Defendants due to said representations by Defendants in that Plaintiffs property was worth in excess of $1,200,000 and Defendant only had a mort-

gage on said property for $350,000. Due to the documents signed on August 25, 1988, Defendants are claiming ownership of said property which results in an unearned benefit of excess of $850,000.

20. Plaintiffs were led to believe by Defendants or their agents that attorney Douglas Austin, a duly licensed attorney (who prepared all documents relevant herein, including the affidavit of 7 February 1989 and the warranty deed at issue, had represented Plaintiffs over a prolonged period in matters related to the real property), had a confidential or fiduciary relationship with Plaintiffs throughout the course of the foregoing events and circumstances.

21. The Plaintiffs' interests, contrary to their belief throughout, were not served either by said attorney or by the documents described herein but were, in fact, frustrated.

22. That, as a result of the foregoing,

Plaintiffs were misled as to all material matters concerning the property and their rights therein and have relied to their detriment upon the conduct and representations of the Defendant and attorney Austin.

23. That, by reason of the foregoing and by reason of the recording of the warranty deed described in paragraph #2 above, Plaintiffs have no effective means of protecting their interests in the property and the Defendant appears now to possess the present ability to transfer or otherwise encumber same.

24. The sole consideration running to Plaintiffs was the agreement of Defendant to allow Plaintiffs to effect a favorable disposition of the property without being hindered in that effort by Defendant through foreclosure or public notice, either by recording or otherwise.

25. That the purpose and intent of the

above agreement was to assure Plaintiffs continued ability to market the property and otherwise fully protect their interests therein and, as a specific inducement to Plaintiffs for the execution of the documents of 25 August 1988, the Defendant had represented and agreed to do nothing to frustrate Plaintiffs' rights.

26. That contary to the foregoing agreement, the Defendant recorded, without cause, notice or necessity, the affidavit of his agent regarding the state of Plaintiffs' interest in the property and the impending forfeiture to the Defendant. As a direct result thereof, Plaintiff could not pursue prospective purchasers who had shown an interest in the property; or pursue others that may be interested in the property. A copy of the agent's affidavit, recorded 7 February 1989, is attached hereto as Exhibit"C".

27. That due to the foregoing the

Plaintiffs were deprived of the benefit of their agreement of 25 August 1988 and that agreement has entirely failed of its consideration.

28. That the interest charged by Defendant to Plaintiff on the six notes set forth in paragraphs 6 and 7, supra, were at illegal rates and were usurious.

29. That in combining the six notes into one note by adding together the principal due and the usurious interest a new usurious note in the amount of $610,446.14 was created.

30. That the amounts claimed tobe owed on said note of August 25, 1988, by Defendant, from time to time to pay off said indebtedness and have the warranty deed and other documents of August 25, 1988 nullified, included usurious interest demands.

31. That, even if the figure of $610,446.14 had been a correct amount,

it was inadequate consideration to allow a transfer of the property in question from Plaintiffs to Defendant, because the property was worth in excess of one million two hundred thousand ($1,200,000) dollars.

32. That, as a result, Plaintiffs suffer from immediate and irreparable harm for which there is no adequate remedy at law.

33. That Plaintiffs have offered to do equity and have requested Defendant do the same, however Defendant has refused.

34. That the execution and delivery of the aforesaid documents executed by Plaintiffs on the 25th day of August, 1988, were without lawful consideration as no legal benefit flowed to Plaintiffs and no legal detriment flowed to Defendants as a result of such execution and delivery.

35. That, as a result, no enforceable transaction was consumated between the

parties and same is therefore void.

WHEREFORE, the Plaintiffs demand that

1. The defendant be immediately enjoined and restrained from conveying or encumbering the real property described in the documents at issue herein;

2. The warranty deed described in paragraph #2 above and attendant documents be cancelled of record;

3. Cancel all interest because same was usurious, Determine Plaintiffs' indebtedness on the mortgage to be $350,000, less whatever damages this Court may assess against Defendants under Count IV of this complaint.

4. The Court grant such othe relief as is appropriate.

COUNT II

36. That this is an action for the imposition of a constructive trust upon real property located in Eaton County, Michigan and for other relief.

37. Plaintiffs reallege paragraphs 2-35 of Count I.

38. That, in accordance with the above agreement of the parties, the deed from Plaintiffs to Defendant, Robert Soltow, was intended to operate merely as security for the indebtedness and not as an absolute conveyance of Plaintiffs' interest in the property.

39. That Plaintiffs have not, at any time, relinquished any right in the property, whether it be the right to possession, redemption or reconveyance and Plaintiffs have not, at any time, recognized the Defendant, Robert Soltow, as owner of the property.

40. That the entire agreement of the parties, as aforesaid, has never been memorialized in writing contrary to the agreement and expectation of the parties.

41. That Plaintiffs had, and still have, substantial equity in the property and

have never relinquished or transferred same.

42. That, since the recording of the deed on 16 March 1989, the Defendant has made unauthorized entry upon the property and purports to have the lawful right to convey, improve or occupy the property as his own, to all of which Plaintiffs have objected.

43. That, the foregoing, whether the product of fraud or mistake, has deprived Plaintiffs of their rights in the property and has unjustly enriched the Defendant Robert Soltow.

WHEREFORE, Plaintiffs pray the Court:

1. To declare Plaintiffs' right in the premises.

2. To declare that the Defendant holds same as trustee for Plaintiffs.

3. That the deed be construed as a mortgage.

4. That the court direct the Defendant,

Robert Soltow, to reconvey to Plaintiffs or in the alternative that the court enter such judgment as will operate as the reconveyance.

5. That the court determine the amount owed on said mortgage is $350,000.

6. That the court grant such other relief as is appropriate.

COUNT III

44. That this is an action for a declaratory judgment.

45. That Plaintiffs reallege paragraphs 2-35 of count I.

46. That the execution and delivery of the documents described herein had the effect, and were intended by the parties at the time to have the effect, of creating additional security for Defendant, Robert Soltow, and were made and given, and agreed to be made and given, and accepted for no other or further purpose.

47. That contrary to the intent and agreement of the parties, the documents now of record and writings attendant thereto, without more, may tend to establish the deed, Exhibit A, as an absolute conveyance of Plaintiffs' interest and the Defendant, Robert Soltow, now appears to so assert.

48. That Plaintiffs allege that said deed was intended to be treated and should be treated and held to be in the nature of a mortgage and not an absolute conveyance of Plaintiffs' interest.

49. That Plaintiffs are in doubt as to their rights in the property described in the deed and Plaintiffs' position in this regard is presently controverted by the Defendant, Robert Soltow, since Defendant appears to assert ownership of the fee without condition.

50. That the following facts would support Plaintiffs' contention as to

the intent and effect of the above described documents of the 25th day of August 1988:

A. The Plaintiffs believed, and were led to believe by Defendant, Robert Soltow, and attorney Douglas J. Austin, that no acts or neglect on the part of the Defendant, Robert Soltow would interfere with or hinder Plaintiffs in their continued efforts to market the property; however same was untrue as the Defendant, Robert Soltow, by his apparent agent, has by specific act(s) impaired Plaintiffs' ability by, among other things, recording the affidavit of 7th day of February 1989 upon the public records.

B. The Plaintiffs believed, and were led to believe by the Defendant, Robert Soltow, and attorney, Douglas J. Austin, that Plaintiffs retained the right to redeem the property following the event of any recording of the deed, however, same was untrue as Defendant, Robert Soltow, now asserts in this context that he is the owner of the property and that the mortgage debt has been extinguished and the Plaintiffs have no subsisting rights with respect to the property.

C. That although Defendant, Robert Soltow, asserts absolute ownership and extinguishment of the debt, the mortgage has not been discharged nor has the note or amended note been cancelled or returned to Plaintiffs and some remain in Defendant Robert Soltow's possession.

D. There was no consideration for the execution of the documents of 25th day of August 1988, including the deed, and the result of the execution of same has been to deprive Plaintiffs of the protection accorded by the prior mortgage, while those same documents of 25th day of August 1988, granted to the Defendant, Robert Soltow, the advantage of a greater secured debt, and earlier mortgage due date, and rights in adjacent property, not available under the original mortgage.

E. That, as all parties well knew, the Defendant, Robert Soltow, had made an attempt, prior to 25th day of August 1988, to purchase the subject property from Plaintiffs and had been denied, and the Defendant, Robert Soltow, well knew of its fair market value, and that the fair market value greatly exceeded the sums due under the mortgage and amended mortgage.

F. That the Defendant, Robert Soltow, and attorney, Douglas J. Austin, had made, on the 25th day of August 1988, an thereafter, verbal assurances to Plaintiffs that the Defendant, Robert Soltow, no longer desired to own the property, that Defendant, Robert Soltow, could not obtain title without observing Plaintiffs' redemption rights, that such rights were pre-served, that no interference with Plaintiffs' efforts to market the property would be committed by Defendant, Robert Soltow, that Defendant, Robert Soltow, would cooperate whenever Plaintiffs could arrange any sale or conveyance and that no further written agreements, other than as set forth in the documents of the 25th day of August 1988 were necessary for anyone's protection.

G. That Defendant, Robert Soltow, knew on the 25th day of August 1988, and at all times thereafter, that Plaintiffs had no intention to execute an absolute conveyance of the property, and that Plaintiffs did not believe, at any time, that they had done so, but Plaintiffs merely sought and intended some refinancing arrangement.

H. That attorney Douglas J. Austin had prepared all of the documents of the 25th day of August 1988, the exact form, content and extent of which had not been requested by Plaintiffs.

I. That attorney Douglas J. Austin supervised the execution of the documents of the 25th day of August 1988 and was the only attorney present or participating in same.

J. That the Defendant, Robert Soltow, and attorney Douglas J. Austin, well knew at the time of the execution of the documents on the 25th day of August 1988, that Plaintiffs believed that attorney Douglas J. Austin was acting as Plaintiffs' attorney, that their rights in the property were being protected and observed by those documents, and by his conduct, yet the attorney, Douglas J. Austin did not, at that time, or at any time indicate or suggest to Plaintiffs that other counsel should be obtained by them.

51. That Plaintiffs assert that the documents operated only as further security for Defendant, Robert Soltow, and

that their right of redemption exists.

52. That the Defendant, Robert Soltow, apparently asserts that the conveyance was absolute and that Plaintiffs' rights in the property have terminated.

53. That the entire transaction is without consideration and if sustained, will result only in the unjust enrichment of the Defendant, Robert Soltow, at Plaintiffs' expense.

54. That as a result of the foregoing scheme or design, effectuated through misrepresentation, Plaintiffs have been damaged and suffer a forfeiture in the absence of the relief herein requested.

55. That Plaintiffs have offered, and hereby offer, to do equity.

WHEREFORE, Plaintiffs pray the Court:

a) to declare the rights of the parties under the above transaction;

b) that the deed be declared and held to be a mortgage;

c) that the amount due and owing on the note and mortgage be $350,000;

d) that Plaintiffs be permitted to have six months before the said note and mortgage are due;

e) if it becomes necessary for Defendant to foreclose on said note and mortgage that Plaintiff be permitted to redeem according to law;

f) that the court grant Plaintiffs whatever additional relief equity demands.

COUNT IV

56. Plaintiffs reallege paragraphs 2-35 of Count I.

57. That the transaction of August 25, 1988, from Plaintiffs to Defendants was in violation of Section 4 and/or Section 5 of Michigan Public Acts of 1919, No 310, as amended, (MCL 566.14 and MCL 566.15) in that said Plaintiffs were insolvent or became insolvent due to said transaction

and the transaction was made without fair consideration; and/or the transaction, which was without fair consideration, was at a time when the Plaintiffs were engaged in the business of selling and/or developing real estate and said transaction left Plaintiffs with an unreasonably small capital.

58. That the transaction or transfer of August 25, 1988, is voidable and must be set aside.

WHEREFORE, Plaintiffs pray the Court:

1. Declare the transfer to be null and void;

2. Order the return of the property to Plaintiffs, subject to a mortgage to Defendants in the amount of $350,000;

3. Grant such other relief as is just and proper.

COUNT V

59. That this is an action for damages which exceed $10,000.

60. Plaintiffs reallege paragraphs 2-35 of Count I, paragraphs 38-43 of Count II and paragraphs 46-50 of Count III.

61. That on or about the 7th day of February 1989 and prior thereto Plaintiffs were negotiating with various prospective purchasers for the sale of all or various portions of Plaintiffs above described property, all of which was well known to the Defendant, Robert Soltow, and his agent at the time.

62. That on or about the 7th day of February 1989, and prior thereto, the Defendant, Robert Soltow, and his agent, published and declared to others, including Plaintiffs' prospective purchasers, that Plaintiffs title was impaired, that they had no right to convey or that the title was otherwise defective.

63. That the aforesaid publications were communicated to others, including various prospective purchasers, and after

7th of February 1989 to the public generally, all of whom understood the publications to mean that Plaintiffs did not own or could not convey title to the property.

64. That Plaintiffs were unable to pursue prospective purchasers after learning of the recordation of the affidavit of February 7, 1989.

65. That the above statements and publications made by Defendant, Robert Soltow, and his agent, were false when made, known by Defendant and his agent to have been false when made and were specifically made for the purpose of preventing Plaintiffs from entering an agreement to convey to the then existing prospective purchasers for the further purpose of preventing, after 7 February 1989, Plaintiffs from entering an agreement with any and all prospective purchasers.

66. That Plaintiffs have been unable to secure any other prospective purchasers

for the property or any part thereof, and such inability is solely attributable to the wrongful conduct of the Defendant and his agent.

67. The aforesaid conduct on the part of the Defendant, Robert Soltow, and his agent, was purposeful, willful and intentional, and done specifically for the purpose of defeating Plaintiffs' lawful rights and constitutes a continuing invasion of their rights sufficiently outrageous to support an award of punitive damages.

68. That at the time of the aforesaid wrongful conduct of the Defendant's employee or agent, such employee or agent was acting within the course and scope of his employment or agency duties or, in the alternative, was acting within the course and scope of his apparent authority, or in the alternative, was acting only in accordance with the specific authority or approval of the Defendant, given in ad-

vance, or in the alternative, such conduct of the Defendant's employee or agent was subsequently ratified by Defendant, any or all of which is sufficient for liability to be imputed to the Defendant, Robert Soltow.

WHEREFORE, Plaintiffs demand judgment against the Defendant Robert Soltow for compensatory and punitive damages, all costs hereof and such other relief as is appropriate.

____/s/________________
Richard L. Fishell,
Plaintiff

Subscribed and sworn to before me this

22d day of February 1991.

/s/
Susan J. Oberlin,
Notary Public
Ingham County
My Commission Expires:
6/15/92

LESTER N. TURNER P.C.

By /s/
Lester N. Turner (P21632)
Attorney for Plaintiffs
Business Address
4970 Northwind Drive
Suite 200
East Lansing, MI 48823
Telephone No (517)332-790

(Omitted: Exhibit A Warranty Deed
Fishells to Soltow, 8/25/88
Exhibit B Warranty Deed
Wight to Fishell, 7/8/86
Exhibit C Affidavit of
Attorney Douglas Austin)

11 USC 502 Allowance of claims or interests

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2) (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim inlawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that-

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

(2) such claim is for unmatured interest;

(3) if such claim is for a tax assessed

against property of the estate, such claim exceeds the value of the interest of the estate in such property;

(4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;

(5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523(a)(5) of this title;

(6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds-

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of-

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;

(7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds-

(A) the compensation provided by such contract, without acceleration, for one year following the earlier of-

(i) the date of the filing of the petition; or

(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates; or

(8) such claim results from a reduction, due to late payment, in the amount of an otherwise applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor.

28 USC 158 Appeals

(a) The District Courts of the United States shall have jurisdiction to hear appeals from final judgments, orders and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders and decrees entered under subsections (a) and (b) of this section.

28 USC 1254 Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Rule 3007 Objections to Claims

An objection to the allowance of a claim shall be in writing and filed. A copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant, the debtor or debtor in possession and the trustee at least 30 days prior to the hearing. If an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001, it becomes an adversary proceeding

Rule 9019 Compromise and Arbitration

(a) Compromise. On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

Rule 9023 New Trials; Amendment of Judgments

Rule 59 F R Civ P applies in cases under the Code, except as provided in Rule 3008.

[NOTICE LIS PENDENS]

[Sec]27A.2701 Lis pendens as constructive notice; filing; contents; recording, evidence.] Sec. 2701. (1) To render the filing of a complaint constructive notice to a purchaser of any real estate, the plaintiff shall file for record, with the register of deeds of the county in which the lands to be affected by such constructive notice are situated, a notice of the pendency of such action, setting forth the title of the cause, and the general object thereof, together with a description of the lands to be affected thereby.

(2) Such a notice may be filed with the complaint before the service of the summons; but, in that case, personal or substituted service of the smmons must be made upon a defendant, within 60 days after the filing, or else, before the expiration of the same time, publication must be commenced, or service thereof must be made without the state, as prescribed by law. If the defen-

dant dies within 60 days after the filing of the notice and before commencement or completion of service of the summons, the summons may be served upon the person substituted for the defendant within 60 days after such substitution.

(3) The register of deeds shall record such notice, in a book kept for that purpose, upon the payment of the fee as is provided by law. A copy of such record, authenticated by the register of deeds, is evidence of such notice, and the recording of the same, in all courts and places. (MCL 600.2701)

Sec 27A.2711 Same; notice by defendant.] Sec. 2711. Where a defendant sets up in his answer a counterclaim, upon which he demands an affirmative judgment affecting the title to, or the possession, use or enjoyment of real property, he may file for record a like notice at the time of filing his answer or at any time afterwards before final judgment. For these purposes, the defendant filing such a notice is regarded as a plaintiff and the plaintiff is regarded as a defendant. (MCL 600.2711).

Sec 27A.2715 Duration of notice; extension] Sec. 2715. (1) A notice of pendency hereafter filed for record shall be effective as notice for a period of 3 years from the date of filing. Before the expiration of the period, the court upon application of the plaintiff and upon such notice as may be directed or approved by the court, and for good cause shown, may from time to time grant additional orders each extending the period of duration of the notice of pendency for a period of not more than 3 years. If extended, a copy of the notice stating the date of filing of the immediately preceding notice, and stamped or marked "extended", shall be filed for record, recorded and indexed prior to the expiration of the notice of pendency then in force in the manner prescribed in this chapter.

(2) A notice of pendency heretofore filed shall be effective for a period of 3 years from the effective date of this act, and shall be subject to extension as herein prescribed. (MCL 600.2715)

Sec 27A.2721 Index] Sec. 2721. Each register of deeds shall enter in an index to be kept in his office, such references to the said notices, as will enable all persons interested to search his office for such notices without inconvenience. (MCL 600.2721).

Sec 27A.2725 Cancellation of notice; liability of plaintiff for costs and expenses.] Sec. 2725 (1) If a plaintiff filing the notice before the service of a summons fails to serve the same within the time prescribed in this chapter, or after the action is settled, discontinued or abated, or final judgment is rendered therein against the party filing the notice, and the time to appeal therefrom has expired, the court, upon the application of any person aggrieved and upon such notice as may be directed or approved by it, shall direct that a notice of the pendency of an action be cancelled of record by a particular register of deeds, or by all the registers of deeds, with whom it is filed.

(2) If a plaintiff filing the notice unreasonably neglects to proceed in the action, or does not commence or prosecute the action in good faith, the court, in its discretion, upon the application of any person aggrieved and upon such notice as may be directed or approved by it, may direct that a notice of pendency of an action be cancelled of record by a particular register of deeds, or by all the registers of deeds, with whom it is filed.

(3) The cancellation shall be made by a note to that effect, on the margin of the record, referring to the order. A certified copy of the order shall be filed for record

with the register of deeds before the notice is cancelled.

(4) The court, in its discretion, upon directing cancellation of the notice upon termination of the action, or during the pendency thereof if satisfied that the plaintiff who filed the notice unreasonably neglected to proceed in the action or did not commence or prosecute the same in good faith, may direct the plaintiff to pay all or any of the costs and expenses occasioned by filing the notice and the cancellation of the record, aside from the costs of the action itself. (MCL 600.2725)

Sec 27A.2731 Same; by bond; security if not cancelled; recovery on bond.] Sec. 2731. (1) In any pending or future action, other than an action to foreclose a mortgage or for the partition of real property or for dower, in which a notice of the pendency thereof has been filed and in which it appears to the court that adequate relief can be secured to the party who filed the same by the giving of a bond, where the cancellation of such notice is not otherwise expressly provided for or regulated, any person having an interest in the property affected by the action may apply for the cancellation thereof upon notice to all the parties to the action and to such other persons as the court may direct.

(2) The court in which the action is pending may make an order for the bond upon such terms as to costs or otherwise as may seem just. The discretion vested in the court by this section may be exercised in any such action, notwithstanding the same may have been brought to recover a judgment affecting the title to, or the possession, use or enjoyment, of specific real property.

(3) Upon an application as provided in subdivision (1) for cancellation of the notice of pendency, made in any pending or future action for specific performance of

a contract to convey real property, whether or not the court determines that adequate relief can be secured to the party filing the notice of pendency by the giving of a bond, the court may order that the notice be cancelled, upon the giving of a bond by the applicant upon terms fixed in the order, as provided in subdivision (2), unless the person filing the notice of pendency gives a bond, upon terms to be fixed by the order.

(4) The bond shall be in an amount which the court, upon consideration of the affidavits submitted upon the application, deems sufficient to indemnify the applicant for the damages he may incur if the notice of pendency is not cancelled.

(5) The order shall provide that upon failure of the person filing the notice of pendency to give a bond in accordance with the order, the notice of pendency shall be cancelled upon the giving of a bond by the applicant, as provided herein.

(6) Where the person who filed the notice of pendency has given a bond as provided in the order, recovery may be had upon the bond without further leave of the court, upon the discontinuance or abatement of the action, or the cancellation of the notice of pendency because of the neglect of such person to proceed in the action, or upon final judgment against him. The recovery may be obtained by a separate civil action, or by motion in the action as to which the notice was filed. (MCL 600.2731)

Sec 27A.2735 Federal courts; application of chapter.] Sec. 2735 (1) This chapter applies to suits affecting title to real property in the federal courts.

(2) The register of deeds shall file and index notices of the pendency of actions in the federal courts as prescribed herein.

(3) If a suit is removed to a federal court, or remanded to a state court, no additional notice need be filed; the notice

filed in the action prior to removal or remand remains in effect. (MCL 600.2735)

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

94-1109

IN RE

Richard L. Fishell and
Dorothy M. Fishell
Debtors

Richard L. Fishell and
Dorothy M. Fishell
Plaintiffs/Appellants

vs

Robert Soltow and
Rosalee Soltow
Defendants/Appellees

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

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PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

REQUIRED STATEMENTS FOR REHEARING IN BANC

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the United States Court of Appeals for the Sixth Circuit or the Supreme Court of the United States and that consideration by the full Court is necessary to secure and maintain uniformity of decisions:

Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v Anderson, 390 US 414, 88 S Ct 1157, 20 L Ed 2d 1 (1968) reh den 391 US 909, 88 S Ct 1649, 20 L Ed 2d 425 (1968).

And further,

I express a belief, based on reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. The above Supreme Court case was cited by the parties to this appeal and by this Court in the panel opinion and its proper interpretation is signficant because in the words of the above cited Supreme Court decision, "We granted certiorari, (cite omitted), because this case presents

important questions under the bankruptcy laws." 390 US at 418.

2. Whether the panel decision in this case announces a departure from prior precedent concerning the evidentiary standards or burdens placed upon compromise proponents in compromise proceedings in bankruptcy court under Rule 9019 of the Bankruptcy Rules.

3. Whether the panel decision in this case announces a departure from prior precedent concerning the adequacy of the compromise hearing record which must be made before the bankruptcy court so that an appellate court may determine whether the bankruptcy court has rendered "an informed and independent judgment" on the propriety of a compromise which that court approves.

4. Whether the panel decision properly determined that the Debtors lacked standing to appeal an order of the bankruptcy court, rendered pursuant to Rule 9019,

entered over the Debtors' objection, where no 6th Circuit authority is cited in support of the panel decision and the panel decision conflicts with the decision of the 1st Circuit, cited by the panel as authority, and conflicts with 7th circuit authority more directly and factually relevant.

5. Whether Debtors in cases, such as this one, which are not "no-asset" cases may be denied standing to appeal an order rendered pursuant to Rule 9019, entered over their objection where such order, both, forecloses the Debtors from possible recovery of property through an adversary proceeding and concurrently forecloses consideration of the Debtors objection, filed pursuant to Rule 3007, to a Proof of Claim filed against their bankruptcy estate.

6. Whether the panel decision results in the creation of a conflict between the

law of this circuit and the law of the 7th and 9th circuits as well as that set forth by the United States Supreme Court.

__/s/__________________
Roger L. Fishell
Attorney for Petitioners

PETITION FOR REHEARING

Pursuant to Rule 40, Fed R App Pro, and Sixth Circuit Rule 14, the appellants move the court to grant rehearing or reconsideration of the decision entered in the above cause on 16 February 1995 and in support of this motion submit the following.

THE FACTS

Appellants respectfully submit that the court may have overlooked or misapprehended the following matters of a factual nature. The opinion contains factual errors which may well bear upon the ruling of the Court. These are set forth below.

1. The opinion states at p. 1 that "Fishells used the money to purchase a certain parcel of real estate and gave the

Soltows promissory note and a mortgage on the property."

Fishells had purchased the property prior to the time that any loan to them was made by Soltow. See Appellants' Brief, p. 8, fn 23 & 24, [R1(14)][R1(G)].

2. The opinion further states at p. 2 that, as regards the amended agreement of 25 August 1988, "the Soltows agreed not to start foreclosure proceedings and extended the time for repayment of the loan."

This is misleading because there was no extension of time provided, in practical effect, since the cut off date provided for in the amended agreement, to-wit, 15 February 1989, was less than six (6) months from the date of that amended agreement, to-wit, 25 August 1988. The deed in lieu of foreclosure aspect of the amended agreement of 25 August 1988 effectively cut off Fishells redemption rights (without specifically saying so). As a result, Fishells rights in the property were terminated more fully at an earlier point than would have been the case under the original mortgage. See Appellants' Brief, p. 10, fn 32, p. 12, fn 43, p. 28, fn 76, [R1(11) (14)]. These issues were relevant to the allegations of fraud and lack of consideration raised by Fishells as grounds for setting aside the deed to Soltow. (R(6)).

3. The panel opinion concludes at p. 2 that the Fishells had defaulted under the original mortgage, and Soltow did so allege, however, no court ruling ever concluded this to be so and the Debtors contended that no default had occurred because, under the interest-only repayment provisions, the admitted presence of usury rendered no such interest due. See (R1(11)(14), Appellants' Brief, 9-11, & 12, fns 27-38 & 44, [Tr 7/10/92, p. 21-22]

4. The panel opinion also concludes at p. 6 that the bankruptcy court had the

record of the state court proceedings in the case, however the state court never ruled on the merits of the case as the state court only determined that the Fraser firm, as attorneys for Soltow, need not be disqualified as his counsel in that case. See (R1(5))(Bankruptcy docket sheet entries, #4-6), see also Appellee Soltow's Brief, p. 6.

5. The record before the bankruptcy court (the bankruptcy judge did not conclude that the Debtors lacked standing to object to the compromise) and the District Court contained the Debtors' asset and liability information, contrary to the opinion of the District Court. See p. 4 of the 16 February 1995 opinion. This information was provided in the Debtors schedules, in argument at the compromise hearing, in the exhibits to submissions filed by Soltow in the bankruptcy court and in District Court. This information was included in the appeal

record in this court and was supplied in the Joint Appendix filed with this court. As such the record consistently reflected that the Debtors' assets significantly exceeded their liabilities at the commencement of the bankruptcy proceedings. See Appellants' Brief, p. 35, fn 82, p. 40, fn 91, p. 42, fn 93, [R1(8)(11)(14)] [R1(P)(Q)], [Tr 7/10/92, p. 20-29].

6. The opinion at p. 7 addresses the merits of the adversary proceeding. As to the issue of fraud, lack of consideration and equitable mortgage, the loss of Fishells' redemption rights through the 1988 agreement is highly relevant. See Appellants' Brief, p 12, fn 43 & p. 25, 71. As to the issue of costs of litigation, the validity of the usury claim is relevant because its effect could deny Soltow both interest and attorneys fees incurred relative to enforcement of the amended mortgage. See Appellants' Brief, p.12, fn 44,

[R1(11)(14)]. This is doubly relevant because of the substantial divergence of debt to equity, i.e. approximately $450,000 as the principal amount of the debt, vs. $1.38 million, as the appraised property value. See Appellants' Brief, p. 9, fn 25, p. 10, fns 30-32 and p. 11, [R1(11)(14)]. The absence of merit to the Soltow slander of title claim reduced any potential for loss to the estate through litigation. See Appellants' Brief, p. 9, fn 25, [R1(8-11)(13)(14)]. A finding by the bankruptcy court that Soltow's slander of title claim lacked merit, had it considered the issue, could have led the Trustee to either go forward with the trial of the adversary proceeding in August 1992, see Appellants' Brief, p. 4-5, 11, 20-21, & 40, or could have led the Trustee to abandon the adversary proceeding to Appellants' pursuant to 11 USC 554.

The Debtors possessed standing to appeal resolution of the Soltow Amended Proof of Claim, also compromised as part of the settlement orders appealed, since under 11 USC 502 and Rule 3007, they were "aggrieved parties" who had properly filed an objection to that proof of claim. See Appellants' Brief, p. 37-39.

THE LAW

Appellants respectfully submit that the court may have overlooked or misapprehended the following points of law.

1. Standing. The Debtors possessed standing to appeal under any analysis. In the 16 February 1995 decision, the court relies on In Re El San Juan Hotel, 809 F 2d 151 (1st Cir 1987). Three bases for standing are noted with approval in that case, one of which is whether the order appealed "impairs his (appellant's) rights". 809 F 2d at 154. The compromise of the adversary proceeding diminished the prospect that the Appellants in this case could emerge

from liquidation proceedings with some assets and thus "impaired their rights" under the El San Juan analysis. In any event, El San Juan did not involve the appeal of an order of the nature involved here because the order in that case did not foreclose the right of the litigant to protect his interest. The order sought to be appealed in El San Juan merely authorized another action wherein the allegedly aggrieved party would have full opportunity to protect its rights. See El San Juan 809 F 2d at p 155. In the present case, Appellants were forever foreclosed from any relief by the settlement or compromise which is the subject of this appeal.

The equity involved in the disputed property, and the possibility that this could have been ultimately been restored to these Debtors upon a successful appeal to this court, gave the Debtors standing to appeal an order which forever deprived them of this opportunity. A successful appeal could have resulted, ultimately, in a trial in bankruptcy court and a result favorable to the Debtors. An order, such as the order on appeal, which extinguishes the Debtors' chance of obtaining a surplus sufficiently adversely affects the "pecuniary interest" to give standing. Matter of Andreuccetti, 975 F 2d at 417. Under the Andreuccetti analysis, these Debtors had standing to appeal. See Appellants' Brief, p. 40, fn 91, p 43-44.

The Appellants possessed standing to appeal disposition of the Soltow Amended Proof of Claim under 11 USC 502 and Rule 3007. See Appellants' Brief, p. 37-39.

2. Standards for Approval of Compromise. Each of the cases cited by the Court supports the position asserted by the Appellants rather than the position taken by the compromise proponents. The bankruptcy court in the present case allotted 60

minutes for consideration of the proposed compromise, of which 40 minutes was allotted to the compromise proponents and 20 minutes was allotted to the Debtors/Appellants. See Appellants' Brief, p. 6 and p 14 fn 52 [R1(26)], [Tr 7/10/92, p 4-5]. No evidence was presented, in any form, by the proponents of the compromise, see Appellants' Brief, p. 27, [Tr 7/10/92, p. 31], and no findings, material to the issues raised in the Fishells' adversary complaint or Soltow's amended proof of claim, appear in the bankruptcy court's opinion approving the compromise. See Appellants' Brief, p. 17 fn 58 & 61, [Tr 7/10/92, p. 5-15 and p. 32-37].

This court notes, in its 16 February 1995 opinion, reliance upon Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc., v Anderson, 390 US 414 (1968), In Re American Reserve Corporation, 841 F 2d 159 (7th Cir 1987) and In Re A & C

Properties, 784 F 2d 1377 (9th Cir) cert den 479 US 854 (1986). In In Re A & C Properties the appellate court affirmed a compromise approved by the bankruptcy court where "the bankruptcy court held five days of hearings on the Trustee's application for compromise" 784 F 2d at 1381. In In Re American Reserve Corp., the appellate court reversed the lower court's approval of a compromise on the basis that the record contained inadequate findings despite the fact that the bankruptcy court in that case had heard "testimony" from the Trustee as well as argument of the Trustee's attorneys, appellants and others. In TMT Trailer Ferry, see Appellants' Brief, p. 45-49, which sets forth the current governing standard, the United States Supreme Court reversed approval of a compromise made after hearings and evidentiary submissions had been made in the lower court. At 390 US at 450, the Supreme Court, though recognizing the necessity for avoiding protracted proceedings, noted that

> "The need for expedition, however, is not a justification for abandoning proper standards."

The bankruptcy court decision complained of by the Debtors in this case was arrived at without evidentiary submission in any form and contained no findings or analysis by the bankruptcy court on the issues set forth in either of the two (2) matters being compromised, to-wit, 1) the adversary complaint filed by Fishells or 2) in the Amended Proof of Claim filed by Soltow. See Appellants' Brief, p 22-28, [Tr 7/10/92 p. 37-42]. This procedure does not comport with any authority cited to the court in the briefs and does not accord with any authority cited by this court in its 16 February 1995 opinion.

In the 16 February 1995 opinion, the court authorizes a departure from the standards affirmed in each of the above cited cases and results in a decision which does not accord with the standard adopted by the Supreme Court, as noted above, nor with the standard adopted in any circuit.

Wherefore, the Appellants respectfully submit that this matter should be reconsidered or reheard and respectfully pray that this court grants such relief.

SUGGESTION FOR REHEARING IN BANC

Pursuant to Rule 35, Fed R App Pro, and 6th Cir Rule 14, the Petitioners respectfully suggests to this Honorable Court that the above entitled cause is appropriate for consideration on rehearing by all the Judges of this Court convened in banc. In support hereof the Petitioners show:

1. The panel opinion in the above cause contains the factual misstatements and the erroneous legal conclusions noted in the petition for rehearing. The deficiencies alleged by Petitioners are of substantial significance in terms of the Petitioners'

case and in terms of the development of the law on these significant bankruptcy within the Sixth Circuit. The elements of the petition are hereby incorporated in this suggestion for rehearing in banc as if fully set forth herein verbatim.

2. The case involves the proper standard to be observed for proceedings in bankruptcy courts relative to the settlement of controversies pursuant to Federal Bankruptcy Rule 9019. This case also involves the proper application of the mandates outlined by the United States Supreme Court in Protective Committee for Independent Stockholders of TMT Trailer Ferry Inc., v Anderson, 390 US 414 (1968).

3. The panel opinion cites as authority for its decision the above noted Supreme Court decision as well as authorities from the 7th and 9th circuits. These authorities set forth certain requisites regarding the evidentiary threshholds which must be met

by settlement proponents and the bankruptcy judge before the bankruptcy court may properly approve a settlement of a controversy under Rule 9019. The cited authorities also outline certain standards for bankruptcy court analyses and findings of fact which must be met for the creation of a bankruptcy court record which would be sufficient to enable meaningful appellate review of the adequacy of the bankruptcy court's consideration and analyses of the settlement proposal.

4. The panel opinion does not cite any 6th Circuit authority on these issues. A review of the panel opinion and the bankruptcy court record reveals that the authorities upon which the panel opinion purports to rely can not be reconciled with the opinion of the panel in this case. A review of the bankruptcy court record of the compromise proceedings and the panel opinion would support the conclusion that the 6th Circuit

has now permitted bankruptcy court settlements based upon an evidentiary showing that is markedly less rigorous than the showing that is required by TMT Trailer Ferry or by the 7th and 9th circuits.

5. A review of the authorities cited by the panel opinion demonstrates that those authorities consistently employed, and envisioned, some evidentiary submission before the bankruptcy court, in some testimonial or other evidentiary form, by the settlement proponents, in support of a proposed settlement under Rule 9019 so that the record of the bankruptcy court proceedings would adequately reveal, to a reviewing court, that the compromise ultimately approved by the bankruptcy judge 1) was the product of "an informed and independent judgment", at 390 US p. 424, 2) which had considered "all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise", at 390 US p. 424, and 3) repre-

sented a decision that was "fair and equitable". at 390 US p. 434. The reviewing court must be given, as noted in TMT Trailer Ferry, at 390 US p 434,

> "...some basis for distinguishing between well reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boiler plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law."

Appellants' Brief, p 48-49.

6. The facts of the particular case at issue reveal that 1) there were no evidentiary submissions, whether written or testimonial, or in any form, offered by the proponents of the compromise on any issue material to consideration of that compromise and 2) no findings of fact or other specific analysis of the merits of the two (2) controversies being settled were recited or made by the bankruptcy judge. Despite the panel's admitted dissatisfaction with the record made in the bankruptcy court, see Panel Opinion, p. 6, it nonetheless sus-

tained approval of the compromise. In so doing, the panel has established a diminished threshhold for Rule 9019 compliance which is markedly at odds with the requirements set out in TMT Trailer Ferry and the other authorities noted. It necessarily follows that the panel decision is in conflict with the standards adopted in the 7th and 9th circuits and it further follows that the panel decision is in conflict with the standards adopted by the Supreme Court in TMT Trailer Ferry.

Wherefore, the Petitioners respectfully request that a rehearing of the appeal in the above case be granted and Petitioners respectfully request that the members of this Honorable Court order that the above case be reheard in banc.

As counsel for Petitioners herein I certify that the foregoing Petitions are advanced upon good grounds and in complete good faith and not for the purpose of delay.

___/s/_________________
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(813) 365-1930
Attorney for Petitioners/
Appellants

(Certificate of Service omitted)

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF MICHIGAN

In Re:

RICHARD L. FISHELL and
DOROTHY M. FISHELL,

Case No. 90-85144
HON. DAVID E. NIMS, JR.
Chapter 11

Debtors.

RICHARD L. FISHELL and
DOROTHY M. FISHELL,

Plaintiffs,

v

Adversary No. 91-8015

ROBERT SOLTOW and
ROSALEE SOLTOW,

Defendants.
______________________/

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PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT AND IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGEMENT

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INTRODUCTION

On April 23, 1982, Defendant R. Soltow loaned Plaintiffs the sum of $10,000 and made additional loans through March 24, 1988, wherein Defendant R. Soltow had loaned either to Richard Fishell or to Richard Fishell and Dorothy Fishell six separate loans totaling in principal amount the sum of $456,250. Defendant Soltow made the last loan to Plaintiff Richard Fishell on March 24, 1988, in the amount of $55,000. There were six of these transactions and $106,250 of the total principal sum owed was made up of five notes with no security. The sixth note was for $350,000 and took the subject property as security. Defendant R. Soltow charged Plaintiffs a usurious rate of interest on all six loans. These loans were consolidated into one amended promissory note on August 25, 1988. That note carried forward and included all the usurious interest charged on all six loans prior to August 25, 1988. Also on August 25, 1988, Defendant Soltow received from Plaintiffs a mortgage on the subject property included the indebtedness of all six loans together with all the usurious interest charged on all six loans.

Plaintiffs discuss three issues or three remedies concerning these transactions between the Plaintiffs and Defendant Robert Soltow. The first claim is that Defendants charged usurious interest rates on all six loans which were carried over and included in the amended note on August 25, 1988. The second claim is fraud, which includes actual fraud, innocent misrepresentation and silent fraud committed on the Plaintiffs by Defendant Robert Soltow individually and through Attorney Douglas J. Austin, and said fraud gave rise to the documents executed August 25, 1988. The third claim is that Defendants have an equitable mortgage against Plaintiffs' property. Defendant Robert Soltow is claiming that the documents signed on August 25, 1988, gave him title to the property rather than security. Defendant Robert Soltow is therefore claiming ownership of property valued in excess of $1,380,000 based on making a loan of $350,000, secured by said property.

Obviously, this is a very brief introduction to a very voluminous and detailed factual situation. However, Plaintiffs will very carefully and thoroughly take this Court through the duress, fraud and overreaching practiced by Defendant Robert Soltow on Plaintiffs. Plaintiffs will demonstrate to the Court that Plaintiffs are entitled to summary judgment on all three issues.

Plaintiffs will interweave statements of facts with legal argument because Plaintiffs believe that the approach will make it easier to follow Defendant Robert Soltow's and Attorney Austin's paper trail. Plaintiffs will present the matters in a chronological fashion to the Court. (3)

STATEMENT OF FACTS RE: LOANS PRIOR TO AUGUST 25, 1988 TRANSACTION

The Plaintiffs and Defendants have been neighbors for at least twenty years. Plaintiff Richard Fishell and Defendant Robert Soltow have had a personal relationship, which Plaintiff Richard Fishell, assumed to be a friendship, for the last twelve to fourteen years. Plaintiff Richard Fishell and Defendant Robert Soltow would get together socially on a fairly regular basis from the last twelve to fourteen years up until the time this

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present dispute arose. Due to this neighborly and personal relationship, Plaintiff Richard Fishell asked Defendant Robert Soltow, on or about April 23, 1982, if Defendant Robert Soltow would make a $10,000 loan to Plaintiff R. Fishell for personal use, i.e. to buy fertilizer for the farm on which Plaintiffs Fishells reside. Defendant Robert Soltow agreed to same, and on April 23, 1982, Defendant Robert Soltow loaned to Plaintiff Richard Fishell the sum of $10,000 at 0% per annum interest. The promissory note required payment in 160 days (October 1, 1982). Defendant Soltow had both Plaintiffs sign said note and named the payees as Robert Soltow or Rosalee M. Soltow.

Plaintiff Richard Fishell and Defendant Robert Soltow continued their neighborly personal relationship and also became involved in many additional situations wherein Defendant Robert Soltow loaned money to Plaintiff Richard Fishell. A summary of those transactions is as follows: (4)

1. Loan to Fishells from Soltows dated April 23, 1982, in the amount of $10,000, due and payable in 160 days (October 1). This was the personal loan for fertilizer for Fishells' farm, where Plaintiffs reside. The note provides for no interest. However, Defendant Robert Soltow prepared the note that called for repayment of $10,625 on October 1, 1982 (Plaintiffs' Exhibit 1 and Soltow Deposition, P. 28). According to documents prepared by Defendants (Plaintiffs' Exhibits 2, 3 & 7), Defendants claim they charged Plaintiffs 12 1/2% interest on the no interest note. However, on November 13, 1983, Plaintiffs made a payment on this note of $6,000 (13 1/2 months after the whole note was due). Defendant Robert Soltow's records indicate that after receipt of this payment,

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Plaintiffs still owed $6,221 on this $10,000 loan. Defendants reach this conclusion by purporting to have charged Plaintiffs 12 1/2% interest. However, Plaintiffs' Exhibit 2 shows that Defendants charged interest of $2,221 from 4/23/82 to 11/13/83. This is 538 days and works out to be $3.81 a day or $1,390.65 a year, which is really 13.9% interest. So not only was 12 1/2% usurious, but Defendants then chared the Plaintiffs $2.14 a day from 11/13/83 until the note of August 25, 1988 was signed (Plaintiffs' Exhibits 2, 3, 7 and Austin Deposition of 3/20/91, Pp. 62 & 63), which is 12.55% interest.

2. Loan of January 29, 1986, in the amount of $6,250 from Defendant R. Soltow to Plaintiff R. Fishell for personal (5) use for Mr. Fishell to pay off an indebtedness on a tractor for his farm so that Mr. Fishell could pick up the tractor for his farm use. No promissory note was

executed; therefore, no interest rate was provided. However, as will be discussed later, Defendant charged Plaintiff 12% interest on this loan (Plaintiffs' Exhibit 3, 4 and 7).

3. July 8, 1986, loan from Defendant R. Soltow to Plaintiff R. Fishell in the amount of $350,000 to pay off the purchase of the property at issue herein. This loan was evidenced by a promissory note signed by both Plaintiffs, in the amount of $350,000 at 15% per annum interest on the unpaid balance until paid and 20% per annum on the unpaid balance until paid during the period of any default. The principal sum of $350,000 was to be due July 7, 1989. Interest payments were to be made each January 7th and July 7th, beginning January 7, 1987, and ending July 7, 1989, the amount of the payment to be the interest accrued on the unpaid principal balance during the immediately pre-

ceding six months. The note was secured by a mortgage given by Plaintiffs to Defendant Robert Soltow on July 8, 1986, and said mortgage covered the property involved in this litigaton. The note and mortgage were prepared by Douglas J. Austin of the Fraser, Trebilcock, Davis & Foster law firm (note, Plaintiffs' Exhibit 5). As will be discussed later, Defendant charged Plaintiffs in excess of 20% interest on this note (Plaintiffs' Exhibit 3). (6)

4. Loan in the amount of $10,000 on July 16, 1987, and evidenced by a promissory note on same date, signed by both Plaintiffs with Robert Soltow named as payee. The note was payable on demand and provided for interest at the rate of 12% per annum (Plaintiffs' Exhibit 6). Soltow does not remember this unsecured loan for $10,000 and believes it was $25,000 on July 16, 1987; however there is no note for $25,000 in July 1987. How-

ever, as will be dicussed later, Soltow charged Plaintiffs 12% interest on a $10,000 loan of July 16, 1987 (Plaintiffs' Exhibits 3 and 7; also see Robert Soltow's deposition of March 20, 1991, Pp. 49-53).

5. Loan in the amount of $25,000 evidenced by a promissory note dated September 3, 1987. This note was signed by both Plaintiffs and named Robert Soltow as the payee. It was a demand note and set forth interest at the rate of 12% per annum (Plaintiffs' Exhibit 8).

6. Loan in the amount of $55,000 evidenced by a promissory note dated March 24, 1988. This promissory note was signed by Plaintiff Richard Fishell and named Defendant Robert Soltow as the payee. It was a demand note and provided no interest. (Plaintiffs' Exhibit 9).

Defendant Soltow received a bill of sale on a Case tractor for loan #2 set forth above (the loan in the amount of $6,250)

(Plaintiffs' Exhibit 10). The only other loan that was collateralized was loan #3, being the $350,000 loan, which was secured by a mortgage on the real estate involved herein. There (7) were no sworn statements from either Plaintiffs in writing indicating that any of the above loans wee for business purposes, except for $70,000 of the $350,000 loan made on July 8, 1986 (Plaintiffs' Exhibit 11). There were no payments made on any of the loans, except the $6,000 payment made on loan #1, supra. As indicated above, three of the notes required no interest payments and no interest accrual. The first note in fact had the space where the percentage of interest is to be written in marked through. All the exhibits referred to above are exhibits from Defendants or their attorney.

ARGUMENT ON USURY

MCL 438.31; MSA 19.15(1) contains the general provision as to the interest rate legally permissible in Michigan. It provides in pertinent part:

> "The interest of money shall be at the rate of $5.00 upon $100.00 for a year, and at the same rate for a greater or lesser sum, and for a longer or shorter time, except that in all cases it shall be lawful for the parties to stipulate in writing for the payment of any rate of interest, not exceeding 7% per annum."

MCL 438.31c; MSA 19.15(1c) sets forth exceptions to this general usury provision, including exceptions with regard to indebtedness secured by a lien against real property. Of the six loans listed above, the only loan that was secured by real property was loan #3, in the amount of $350,000. The subsection pertinent to that loan is as follows:

> "(11) The parties to a note, bond or other indebtedness of $100,000 or more, the bona fide primary security for which is a lien (8) against real property other than a single family residence, or the parties to a land contract of such amount and nature, may agree in writing for the payment of any rate of interest."

MCL 438.61; MSA 19.15(71) sets forth a

business entity exception. This exception is applicable because the $350,000 loan of July 8, 1986 included a business purpose affidavit for at least $70,000 of the $350,000 loan (Plaintiffs' Exhibit 11).

MCL 438.61; MSA 19.15(71) provides:

> "438.61. Business entities, definition, interest rate agreements.
>
> Sec. 1(1) As used in this act 'business entity' means:...
> (b) A natural person who furnishes to the extender of the credit a sworn statement in writing specifying the type of business and business purpose for which the proceeds of the loan or other extension of credit will be used, but the exemption provided by this act does not apply if the extender of credit has notice that the person signing the sworn statement was not engaged in the business indicated.
> (2) Notwithstanding the provisions of Act No. 326 of the Public Acts of 1966 as amended, being sections 438.31 to 438.33 of the Michigan Compiled Laws, but subject to any other applicable law of this state or of the United States which regulates the rate of interest, it is lawful in connection with an extension of credit to a business entity by a state or national chartered bank, insurance carrier, or finance subsidiary of a manufacturing corporation for the parties to agree in writing to any rate of interest.
> (Emphasis supplied)

> (3) Notwithstanding the provisions of Act No. 326 of the Public Acts of 1966, it is lawful in connection with an extension of credit to a business entity by any person other than a state or nationally chartered bank, insurance carrier, or finance subsidiary of a manufacturing corporation for the parties to agree in writing to any rate of interest not exceeding 15% per year." (Emphasis supplied) (9)

MCL 438.32; MSA 19.15(2) sets forth the penal provision incurred by a violation of the interest limit established in MCL 438.31; MSA 19.15(1), which provides:

> "Any seller or lender or his assigns who enters into any contract or agreement which does not comply with the provisions of this act or charges interest in excess of that allowed by this act is barred from the recovery of any interest, any official fees, delinquency or collection charge, attorney fees or court costs and the borrower or buyer shall be entitled to recover his attorney fees and court costs from the seller, lender or assigns."

As pointed out above, Defendant charged Plaintiff 12 1/2% interest on note #1; 12% interest on notes #2, #4, #5 and #6 and in excess of 20% interest on note #3 (Plaintiffs' Exhibits 3 and 7, Soltow's Deposition, Pp. 59-64).

Note #1 had a line through the space that called for interest payments and another line through the space that called for interest after the note became due if it was still unpaid. Therefore, there was no written interest rate for note #1. There was no note for loan #2. Note #6 had no interest rate provided. Therefore, pursuant to MCL 438.31; MSA 19.15(1), Defendant could not charge Plaintiff in excess of 5% interest because there was no stipulation or agreement in writing by the parties for any rate in excess of 5%. Therefore, the 12 1/2% charged on note #1 and the 12% charged on loan #2 and note #6 were usurious and the penal provisions of MCL 438.32 are applicable. (10)

Notes #4 and #5, for which Defendant charged Plaintiff 12% interest were likewise usurious because MCL 438.31 only allows the parties to charge an interest rate of 7%

unless the agreement fits into one of the exceptions of MCL 438.31c or the business entity exception of MCL 438.61. Neither of these notes fit into either of those exceptions, and the charging of 12% interest brings into effect the penal provisions of MCL 438.32.

Note #3, as set forth above, involved loan of $350,000 and was secured by a first mortgage on the real estate involved herein. In addition, there was a business purpose affidavit as to at least $70,000 of the loan. The real estate was not a single family dwelling and therefore under the exception set forth above in MCL 438.31c(11), the parties could have agreed to any interest rate on that portion of the loan not covered by the business purpose affidavit. Plaintiffs will address this note under both the real estate mortgage exception of MCL 438.31c(11); and the business purpose exception of MCL 438.61, because under either exception Defendants would be guilty of charging Plaintiffs usurious interest rates on this loan too, bringing into effect the penal provisions of MCL 438.32

Business Purpose Exception: The above quoted language of MCL 438.61(3) sets forth that since defendant is "any person" other than an excepted bank, insurance company or finance corporation of a manufacturer, Defendant could not charge an interest rate in excess of 15% per year. According to Defen(11)dants own record (Plaintiffs' Exhibit 3) and Defendants' attorney's record (Plaintiffs' Exhibit 7), Defendants charged Plaintiffs in excess of 20% interest on this note since the inception of the note, July 8, 1986. Defendants claimed they charged 20% because Defendants said since Plaintiffs never made their first interest payment on January 7, 1987, Plaintiffs were in default and therefore the 20% default interest rate was applicable (Soltow Deposition, 3/20/91, p. 62).

Real Estate Mortgage Exception: $280,000 of the $350,000 loan of July 8, 1986, was not covered by the business purpose affidavit and so we must look to the real estate mortgage exception covered by MCL 438.31c(11) (quoted on p. 7, supra). That section provides that the parties may agree in writing to any rate of interest if the note is secured by a mortgage on real estate. It is Plaintiffs' contention that only $280,000 of the $350,000 loan is covered by this section, since the parties specifically provided that $70,000 of the loan was covered by the business purpose exception. However, for purposes of argument Plaintiffs are assuming in this discussion that the whole $350,000 loan of July 6, 1986 is covered by the real estate mortgage exception. Defendants' conduct, assuming the whole $350,000 is within the real estate mortgage exception, creates an usurious rate of interest on the $350,000 loan. There are several ways in which the interest demanded by Defendants on this $350,000 loan are usurious. (12)

First, the court should look at the pertinent language of the promissory note of July 8, 1986 (Plaintiffs' Exhibit 5), which provides:

> "For value received, the undersigned, jointly and severally, promise to pay to the order of Robert Soltow the principal sum of Three Hundred Fifty Thousand Dollars ($350,000) with interest from this date at the rate of fifteen percent (15%) per annum on the unpaid balance until paid and twenty percent (20%) per annum on the unpaid balance until paid during the period of any default herein....
> The principal sum of $350,000 shall be due July 7, 1989. Interest payments shall be made each January 7th and July 7th, beginning January 7, 1987 and ending July 7, 1989, the amount of the payment to be the interest accrued on the unpaid principal balance during the immediately preceding six (6) months. Notwithstanding the foregoing, all interest accrued to the date of the final principal payment shall be paid with the final principal payment. Princi-

> pal may be prepaid without penalty."
> (Emphasis supplied)

From the date of the inception of the note of July 8, 1986, until the time it was replaced with an amended promissory note on August 28, 1988, Plaintiffs never made any payment of interest or principal on said note. According to Defendants' calculations and demands for interest on this note, Plaintiffs were charged interest of $119,232.67 to April 6, 1988 (Plaintiffs' Exhibit 3; Plaintiffs' Exhibit 7 and Soltow deposition, 3/20/91, Pp. 59 & 60). Further, using the Defendants' calculation of continuing interest at $206.17 per day, Attorney Austin calculated the interest demanded by Defendants of Plaintiffs from April 6, 1988 to August 25, 1988. Mr Austin brought the (13) figures to date for the renewal note of August 25, 1988 by multiplying the number of days since April 6, 1988 to the renewal on August 25, 1988 (Plaintiffs'

Exhibit 7 and Austin Deposition of 3/20/91, Pp. 62 & 63). Plaintiffs will now discuss the various ways in which the interest charged to Plaintiffs by Defendants on this note was illegal.

1. Defendants factually charged Plaintiffs an interest rate in excess of the interest rates set forth in the note.

The interest provided for in the note of July 8, 1986, is usurious. The interest charged to Plaintiffs by Defendants and demanded by Defendants from Plaintiffs was usurious and the renewal note of August 25, 1988 included these usurious interest charges. First, let's examine the interest actually charged to Plaintiffs by Defendants for the note of July 8, 1986. For purposes of this discussion, Plaintiffs assume arguendo that the interest rates set forth in the note are legal. (Plaintiffs will discuss the legality of the interest rates set forth in the note after this discussion on the actual interest demanded from and charged to Plaintiffs by Defendants). An interest rate demanded and charged which is in excess of the amount set forth in the note cannot be legally allowed and is usurious.

Under MCL 438.31c(11), the parties can agree to any interest rate in writing for a real estate mortgage note. These parties agreed to 15% interest when not in default and 20% when the note was in default. No principal payments were due (14) until July 7, 1989. Interest payments were due every 6 months commencing January 7, 1987. Plaintiffs made no payments under this note. For purposes of this argument, Plaintiffs will assume that when Plaintiffs failed to make the first interest payment on January 7, 1987, Plaintiffs were in default of the note. With that assumption, Plaintiffs owed 15% interest from July 8, 1986 to January 7, 1987 and owed 20% from January

7, 1987 to the renewal note of August 25, 1988. The calculations are simple.

A. Interest due under the note.

(1) $350,000 at 15% interest from date of note, July 8, 1986, to when first interest payment was due, January 7, 1987, which is 183 days. $350,000 x 15% = $52,500 per year (divided by) 365 days = $143.84 per day X 183 days = $26,322.72.

(2) $350,000 at 20% interest from January 8, 1987 (first date interest was due and unpaid and assume for this argument that Plaintiffs are then in default). Since Defendants' calculations (Plaintiffs' Exhibits 3 & 7) calculate the interest owed to April 6, 1988, Plaintiffs will do same. January 8, 1987 to April 6, 1988 is 453 days. $350,000 at 20% per year is $70,000 in interest per year (divided by) 365 is $191.78 per day x 453 days = $86,876.34 in interest due January 8, 1987 to April 6, 1988. Amount that Defendants

should have demanded and charged Plaintiffs as of April 6, 1988 should have been:

$350,000.00	Principal
26,322.72	15% interest to 1/7/87
86,876.34	20% interest from 1/7/87 to 4/6/88
$463,199.06	(14)

B. Amount Defendants actually demanded and charged to Plaintiffs.

(1) According to Plaintiffs' Exhibits 3 & 7, which were prepared by Defendant Robert Soltow and Attorney Douglas Austin, Defendants demanded and charged to Plaintiffs as of April 6, 1988, the sum of $469,232.67.

(2) According to Plaintiffs' Exhibits 3 & 7, the Defendants were charging Plaintiffs $206.17 per day on this $350,000 loan. Even at 20%, the per day interest rate on $350,000 is $191.78 (calculations set out above). The $206.17 charge per day in interest is $21.5% interest. ($350,000 x 21.5% = $75,250 per year (divided by) 365 = $206.16 per day.)

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C. Conclusion.

Even if the note of July 8, 1986 is not usurious, the demands and charges made by Defendants, purportedly pursuant to that note, are illegal and usurious.

D. Possible defenses that Defendants may raise:

(1) Defendants mistakenly compounded interest. Interest cannot be compounded. MCL 438.31c(9) provides:

> "(9) A mortgage loan or land contract made under this act shall not provide for a rate of interest added or deducted in advance and interest on the mortgage or land contract shall be computed from time to time only on the basis of its unpaid balances."

Further, under Michigan law, even when interest on interest was allowed, interest on interest could not be charged (16) where not specifically provided in a written agreement. Voight v Beller (1985) 56 Mich 40; 22 NW 270 and Hoyle v Page

(1879) 41 Mich 533; 2 NW 665.

(2) Defendants conduct is due to an innocent mistake and this usurious rate of 21.5% was not done intentionally.

The law in Michigan clearly provides that an innocent mistake does not excuse Defendants from their charging a usurious interest rate. Even if the usurious interest rate had been at the insistence of Plaintiffs, Defendants could not charge a usurious rate. The law does not recognize unintentional and innocent usury charges; nor, can Defendants raise the issue of estoppel to keep Plaintiffs from asserting usury. Bebee v Grettenberger (1978) 82 Mich App 416; 266 NW2d 829 and Osinski v Yowell (1984) 135 Mich App 279; 354 NW2d 318.

2. The note of July 8 did not authorize an increase to 20% until July 8, 1989.

Even if Defendants had just charged

Plaintiffs 15% interest on the whole $350,000 from July 8, 1986 to January 7, 1987 (the date the first interest payment was due) and then charged Plaintiffs 20% from then until the note of August 25, 1988, the Defendants would still be guilty of usury. The note of July 8, 1986 does not provide for an increase in interest from 15% to 20% unless there was default by Plaintiffs in making the first principal payment (a balloon payment of the (17) entire principal amount), which was due July 7, 1989. The note provides:

> ". . . with interest at the rate of fifteen percent (15%) per annun on the unpaid balance until paid and twenty percent (20%) per annum on the unpaid balance until paid during the period of any default herein.
>
> . . .
>
> The principal sum of $350,000 shall be due July 7, 1989. . ."

There was no intent and the note does not say that the interest rate will be increased from 15% to 20/% due to nonpayment of just an interest payment. The usury statute makes it very clear that 5% is the maximum rate unless the agreement is in writing and the writing must clearly provide for additional interest rates under proper exceptions or exemptions. In addition, this note was prepared by Defendants and any ambiguity must be resolved against said Defendants.

Alternatively, the most the language could permit would be an increase from 15% to 20% on that portion of the note which is in default, which is only the interest payment. There was never a default on the principal payment because no principal payment was due until July 7, 1989. However, the Defendants' document (Plaintiffs' Exhibits 3 & 7) show that Defendants computed 20% interest on the principal and 20% interest on the interest payment that was due January 7, 1987.

3. The note of July 8 was usurious

on its face. (18)

In argument 1, under this real estate mortgage exception, Plaintiffs stated that for purposes of that argument Plaintiffs would assume the note as drafted was not usurious. Under argument 2 of this exception, Plaintiffs pointed out that the note did not permit an increase in the interest rate from 15% to 20% until and unless there was a default on the principal payment. If the Court concludes that the note as written permitted the Defendants to increase the interest rate from 15% to 20% on both principal and unpaid interest or just on principal, on January 1, 1987, when the first interest payment was not made, then it is Plaintiffs' position that the language that would permit that is usurious. MCL 438.101; MSA 19.21 provides:

> "438.101 Interest on due and unpaid interest; rate Sec. 1. That when any installment of interest upon any

> note, bond, mortgage or other written contract shall have become due and the same shall remain unpaid, interest may be computed and collected on any such installment so due and unpaid, from the time at which it became due at the same rate as specified in any such note, bond, mortgage or other written contract, not exceeding 10 percent and if no rate of interest be specified in such instrument, than at the rate of 7 per centum per annum." (Emphasis supplied)

According to the computations set forth below, the Defendants calculated 15% on the principal amount through January 7, 1987. The Defendants calculated at 20% on the principal balance of $350,000 together with the interest to January 7, 1987 (as calculated by Defendants of $26,250) for a total of $376,250. These are the calculations that must have been made by Defendants: (19)

$350,000 x 15% = $52,500 x 1/2 year July 8, 1986 to January 7, 1987) = $26,250.

$376,250 x 20% = $75,250 (divided by) 365 days = $206.1643836 per day, which Defendants must have rounded up to $206.17

per day.

Defendants then continued to charge Plaintiffs 20% on that amount $376,250 ($206.17 per day) until the note of August 25, 1988. Therefore, after January 7, 1987, Defendants were charging Plaintiffs 20% interest on the principal and on the interest due on January 7, 1987.

a) The interest rate of 20% on the interest due on January 7, 1987 is usurious. MCL 438.101 makes it clear that the maximum interest that could be charged on interest is 10%. So assuming the language in the note authorizes interest on interest, the rate could not exceed 10% and Defendants charged 20%.

b) The 20% charged by Defendants against Plaintiffs on the principal would be usurious. Visoneering v Belle River (1986) 149 Mich App 327, 337, 286 NW2d 185, provides:

"MCL 438.101; MSA 19.21 permits

> the computing of interest at a rate not exceeding ten percent (or the amount specified in the mortgage) on any due and unpaid installments of interest, but not principal." Emphasis supplied)

4. Business purpos portion of $350,000 loan of July 8, 1986.

Further, as pointed out earlier, $70,000 of the $350,000 loan was under the business purpose exception and would be limited to 15% interest. That being the case, the daily rate (20) charged by Defendants of 20% on $376,250 wuld be grossly usurious.

FACTUAL STATEMENT LEADING TO DOCUMENTS OF AUGUST 25, 1988

The only payment that Plaintiffs made to Defendants, on any of the above loans, was the $6,000 payment on loan #1 (Plaintiffs' Exhibit 2). The last loan was for $55,000 made on March 24, 1988, a note from Richard Fishell to R. Soltow (Plaintiffs' Exhibit 9). According to Defendant R.

Soltow this $55,000 loan was so Plaintiff R. Fishell could have the contractor finish the work on a storm drain located on the Andre property (Soltow Deposition, P. 65). In fact, the Andre property was property Plaintiff R. Fishell was buying that is adjacent to the property involved herein and the storm drain constructed by Plaintiff R. Fishell was really for the benefit of the subject property. Once the storm drain was completed all the utilities would be supplied to the subject property. The subject property has been appraised by an MAI, SREA appraiser as having a fair market value of $1,380,000 (Plaintiffs' Exhibit 12). This appraisal was contracted for by a potential purchaser dealing with Plaintiff R. Fishell. It would appear that Defendant R. Soltow placed a value on this property in November of 1989 of $1,500,000 (Plaintiffs' Exhibit 24, Lowe Deposition 2/20/91, Pp. 8 & 9). During the time that

Plaintiff R. Fishell was dealing with Defendant R. Soltow, Plaintiff R. Fishell had installed a $198,000 sewer project to extend the water and sewer along M-43 to the site and had constructed the storm drain mentioned above. Defendant R. Soltow was aware of all of this progress. Defendant R. Soltow never made any demand of Plaintiffs' default (21) on any of the notes #1 through #5, supra; and, on March 24, 1988 made the additional loan to Plaintiff R. Fishell of $55,000.

March 24, 1988, Defendant R. Soltow made the $55,000 loan to Richard Fishell. Defendant Robert Soltow never made any demand on Plaintiffs to cure any "defaults" on any notes to Defendants. Just after the $55,000 loan Plaintiff Richard Fishell had 12 lots on the Andre property which were just to the point where he could sell them. Defendant R. Soltow came to see Plaintiff R. Fishell and wanted to buy 5 lots for $100,000. Defendant Soltow knew Plaintiff was asking $28,000 for each of the lots and Fishell told Defendant he could not afford to take a $40,000 loss on these lots. Thirteen (13) days after this loan of $55,000 Defendant R. Soltow had his office personnel calculate what Defendant R. Soltow claims Plaintiffs owe him on the now 6 notes (Plaintiffs' Exhibit 3, showing calculations made as of 4/6/88). Then 23 days after that, on April 29, 1988, Defendant Soltow has attorney Douglas Austin write Mr. Fishell a letter that sets forth what Defendant Robert Soltow claims is due on each of the six notes as of April 6, 1988. The letter also says:

> "To the extent the obligations are demand obligations, or obligations due by a date certain which has passed, demand hereby made for full payment. To the extent they are installment obligations in default, default is hereby declared and acceleration elected." (Plaintiffs' Exhibit 7)

Unbeknownst to Plaintiffs, the plot

or scheme of Defendant R. Soltow is going into high gear. Defendant Soltow has been very friendly and very neighborly. Plaintiff R. (22) Fishell and Defendant R. Soltow had lunch together regularly, visited with each other constantly. Defendant Soltow loaned Plaintiff Fishell whatever money he needed to improve the property without ever demanding repayment. Defendant Soltow let Plaintiff Fishell get Plaintiff Fishells' property all prepared for sale or development. In February or March of 1988, just before Defendant Soltow loaned Plaintiff Fishell the $55,000, Defendant Soltow asked Plaintiff Fishell what he would take to sell the subject property to Defendant Soltow. Plaintiff Fishell answered that he was not interested in selling the property. Defendant Soltow then offered Plaintiff Fishell One Million Three Hundred Thousand to One Million Four Hundred Thousand for the subject property and the Andre preperty. Further, Defendant Soltow offered to put Plaintiff Fishell on his payroll for two years. Plaintiff R. Fishell said he didn't work for anyone. He said he couldn't see himself being valuable to anyone because he had never worked for anyone. Plaintiff Fishell also told him he did not wish to sell. He had been working to development or sell the properties in sections and he wasn't dead yet and wanted to see it through.

At this time, Defendant Soltow had a mortgage for $350,000 on property that was worth at least $1,300,000. He wanted to buy it and had been rejected. There were no hard feelings expressed at that time. March 24, 1988, he had just loaned Plaintiff Fishell $55,000 to complete some utilities. Now without any mention to Plaintiff Richard Fishell in their (23) almost daily visits, Defendant r. Soltow has Attorney Austin send the above letter demanding payment on all six notes.

It is significant to point out at this juncture that attorney Douglas J. Austin, a shareholder in the law firm of Fraser, Trebilcock, Davis & Foster, P.C. was Defendant Robert Soltow's attorney and was also Plaintiffs' attorney when he wrote his letter of April 29,1988. He had been Plaintiffs exclusive attorney since July, 1986. He represented the Plaintiffs on numerous matters and continued to bill Plaintiffs for legal services through April 20, 1989 and for costs and expenses as late as June 28, 1989. (See Plaintiffs' Exhibit 13, R. Fishell's Affidavit, and Plaintiffs' Exhibit 14, statements for services rendered by Austin to Plaintiffs, which were submitted in Eaton County Circuit Court in support of Plaintiffs' motion to disqualify the Fraser law firm from representing Defendants in this matter.)

Then on August 12, 1988, Attorney Austin sent a letter to Plaintiffs (which salutation said: Dear Dick and Dorothy, Plaintiffs' Exhibit 15). The letter included the following:

(1) A proposed land contract covering the subject property. Defendant R. Soltow was the vendor and Plaintiffs were the vendees. The purchase price was $613,683.64, which was suppose to be the outstanding indebtedness on the six loans owed from Plaintiffs to Defendants, with the usurious interest calculated to 8/16/88 (the proposed land contract is Plaintiffs' Exhibit 16); (24)

(2) The letter advised the Plaintiffs that they would have to sign a warranty deed to Soltow and Soltow would sign a discharge of mortgage and would cancel the six notes. The Plaintiffs would also have to sign a business purpose affidavit;

(3) This transaction was suppose to be in lieu of the mortgage note and other outstanding obligations;

(4) The land contract was to be at 15% interest and was due to be paid in full September 30, 1988, which was only 45 days after the land contract was to be signed on August 16, 1988;

(5) Austin also advises the Plaintiffs will gain more time to pay off Defendant by this approach and them provides the Plaintiffs with some very interesting, but disturbing, legal advise. Of course, this advise comes from Attorney Austin who, according to his testimony, specializes in real estate law, including foreclosures (Austin Deposition 3/20/91, P. 47). The letter states:

> "As discussed, if the land contract is not paid by the end of September, Bob will, through us, mail a 15-day notice of forfeiture to you. If, within the 15 days, the contract is not paid, we will start a forfeiture action in District Court, which will have a 90-day redemption period. This would mean the property would become Bob's at approximately the end of January, 1988 unless re-

> deemed. This is actually a month longer than you would have had under mortgage foreclosure, assuming we had published in June, with a sale in early July with six-month redemption period." (Emphasis supplied) (25)

When Plaintiffs received this information, they relied on the accuracy of the representations made in the letter and in the proposed land contract (Eaton County Transcript of 2/27/90, Pp. 59 & 60. There were at least two very significant representations that were made that were incorrect. The first was that the Plaintiffs were indebted to Defendants for $613,683.64, without disclosing to Plaintiffs that the interest charges were usurious; and (2) that if Austin had, on behalf of Defendants, commenced foreclosure by advertising back in June the Plaintiffs' redemption period would have run prior to the end of January, since there is only a 6 month redemption. Ignore that Austin is representing that the redemption time would have run before the end of January if advertising had been in June, which it had not been and this was August. Ignore that if there was a six month redemption period and if Attorney Austin commenced advertising by August 15, there could not have been a sale held until at least September 15 (MCL 600.3208; MSA 27A.3208) causing Attorney Austin's six month redemption period to expire March 15, 1989. The real serious problem with Attorney Austin's misrepresentations is the misrepresentation that Plaintiffs only had a six month redemption in a foreclosure by advertising. This is patently inaccurate. The subject property is approximately 43 acres in Oneida Township, Eaton County. In 1986 when the mortgage was given and in 1988 when this letter was written the property was farm land. Plaintiff R. Fishell bought the subject property in 1985 and it had a crop of soy beans on it (26) when Plaintiff

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R. Fishell purchased it. The owner of the land retained ownership of the crop of soy beans. In 1986 Plaintiff Fishell had a crop of oats planted on shares on said property. In 1987 the farm land was idle because Plaintiff R. Fishell had to construct a drain on the subject property. The farm was also idle in 1988. There was a crop of white beans grown on it by farmer Huhn in 1989 or 1990. MCL 600.3240; MSA 27A.3240 sets forth the redemption periods for foreclosure by advertising and the applicable section is secton (8), which provides:

> "(8) In any other case, the redemption period shall be 1 year from the date of sale."

Therefore, had Attorney Austin commenced foreclosure by advertisement August 15, 1988, Plaintiffs would have had until approximately September 15, 1989 to redeem. Further, they could have challenged the usurious interest had Attorney Austin advised them that it was usurious.

The land contract that was proposed to Plaintiffs by letter of August 12, 1988 was never executed. Attorney Austin testified that the land contract proposal was withdrawn because he advised his client Defendant R. Soltow that it would not work (Austin's deposition of 3/20/91, P. 47).

AUGUST 25, 1988 TRANSACTION

The next thing that occurs is Attorney Austin has Plaintiffs and Defendant R. Soltow meet a Defendant R. Soltow's office to sign the infamous documents of August 25, 1988. It should first be noted that Attorney Austn did not tell the (27) Plaintiffs that he was not looking out for their interests (Eaton County Circuit Court transcriptof hearing, 2/27/90, R. Fishell - Pp. 45 & 46; Mrs. Fishell - Pp. 112-115; Defendant R. Soltow deposition 3/20/91, Pp. 78 & 79). The documents that were prepared by Attorney Austin and presented to the parties for signature, without any explanation to Plaintiffs, which were signed on August 25, 1988, were:

1. Amended Promissory Note, $610,446.14 (Plaintiffs' Exhibit 17); This note was at the interest rate of 15%. It states "This note replaces the note dated July 8, 1986 given by the undersigned to Robert Soltow in the principal amount of $350,000";

2. Mortgage Modification Agreement (Plaintiffs' Exhibit 18). It amends the mortgage of July 8, 1986 from $350,000 to $610,446.14 and provides:

> "The mortgage shall continue in full force and effect and except as above specifically modified and amended the mortgage shall be unamended, unchanged, and unmodified by this agreement and shall continue to secure to mortgagee the repayment of mortgagor's indebtedness or other obligations to mortgagee."

3. Escrow Holding Agreement (Plaintiffs' Exhibit 19). This sets forth the

six loans from Defendant Soltow to Plaintiff Fishell, says they are all in default, claims Defendant Soltow has accelerated all of them and states the balance on all six notes to be $610,446.14. It states the current balance on the $350,000 note of 7/8/86 to be $498,302.64 and the balance owing on the other notes, as accelerated, is $112,093.50. It also (28) covers the other documents that are being executed at that time. It provides that Plaintiffs will provide a warranty deed to the subject property to Defendant, which will be held in escrow along with a discharge of mortgage from Defendant R. Soltow to Plaintiffs. If Soltow notifies the escrow agent the note is paid, Plaintiffs will receive the discharge of mortgage and get back their warranty deed. If Soltow advises the escrow agent the note is in default, the discharge of mortgage and the warranty deed will be delivered to defendant R. Soltow.

4. Warranty Deed on the subject property from Plaintiffs Fishells to Defendant R. Soltow (Plaintiffs' Exhibit 20). The deed signed by the Fishells provides:

> "This deed is given in lieu of foreclosure of the mortgage recorded in Liber 707, Page 630, Eaton County Records. This conveyance shall not operate as a merger of Grantee's interest as the mortgagee under the previously described mortgage with Grantee's title acquired under this conveyance."

5. Declaration of Storm Drain (Plaintiffs' Exhibit 21). Plaintiffs Fishells were purchasing property contiguous to the subject proeprty over which Plaintiff R. Fishell had constructed a storm drain basically for the benefit of the subject property. This document gave the subject property a permanent easement over the contiguous property. It also provides that Fishells shall bear the cost of maintaining the drain "until such time, if at all, that Robert Soltow, his heirs, assigns or perso-

nal representatives take title to parcel one through fore-(29)closure or through deed in lieu of foreclosure." (Emphasis supplied).

6. Discharge of Mortgage - Signed only by Defendant R. Soltow (Plaintiffs' Exhibit 22). All these executed documents, except the promissory note were mailed to Plaintiffs by Attorney Austin on August 26, 1988 (Plaintiffs' Exhibit 23). Attorney Austin testified that in arriving at the $610,446.14 indebtedness placed on the amended note of August 25, 1988, he made the calculations. He referred to Plaintiffs' Exhibit 3 (Soltow Deposition Exhibit 10) and used the per diem interest rate for each loan and brought current the balance on each note (Austin Deposition 3/20/91, P. 64). That means Austin continued to apply the usurious rates of interest on each of the six loans, as discussed in detail above, including the per diem of

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$206.17 on the $350,000 loan. As shown earlier $206.17 per day on $350,000 is 21.5% interest. Therefore when the amended note was prepared and executed on August 25, 1988 for $610,446.14, it included all the usurious interest charges on all six loans.

DID DRAFTING A RENEWAL NOTE ON AUGUST 25,1988 AFFECT THE USURIOUS INTEREST CHARGED ON THE SIX (6) LOANS?

The law in Michigan is firmly established that since the amended note of August 25, 1988 includes usurious interest charges, it continues to be usurious. It isn't even necessary to examine or review whether the interest rate charged in the amended note of August 25, 1988, being 15%, is usurious. The (30) Michigan law is set forth in Mathews v Tripp (1938) 285 Mich 705, at 710; 281 NW 412, wherein the Court in quoting the Restatement of the Law of Contracts says as follows:

"In 2 Restatement of the Law

> of Contracts, S535, it is said: 'Where a bargain is usurious, an agreement in renewal thereof, or in substitution therefor, which provides for a payment that includes the the usurious interest is also illegal, although no excessive interest is promised from the date of the renewal or subsititution.'"

Also, on Page 710 of the Mathews case, supra, the court further elaborated on the law in Michigan as follows:

> "'It seems to be the rule that the general principle determining when an indebtedness infected with usury is to be deemed disinfected that if the tainted obligation is, with full knowledge and consent of the borrower finally canceled or abandoned, and a new obligation, containing no part of the usury, is executed in legal form, and supported solely by the moral obligation resting upon the borrower to pay the money actually received with legal interest thereon, such new obligation is valid and enforceable. * * * Carr v. Taylor, 30 Misc. Rep. 617 (62 N.Y. Supp. 849); 30 Cyc. p. 1002; Gladwin State Bank v Dow, 212 Mich. 521 (13 A.L.R. 1233).' Union Guardian Trust Co. v Craw-

ford, 270 Mich. 207.
'If a transaction is usurious in its inception, it remains usurious until purged by a new contract; and all future transactions connected with or growing out of the original are usurious and without valid consideration. An original taint of usury attaches to the whole family of consecutive obligations and securities growing out of the original vicious transaction; and none of the descendant obligations, however remote, can be free of the taint if the descent can be fairly traced.' Webb on Usury, S308.

See, also, Gladwin State Bank v Dow, 212 Mich. (31) 521 (13 A.L.R. 1233).
As said in Continental National Bank of Chicago, Illinois v Fleming, 170 Mich. 624, 643:
'If the transactions on account of which the indebtedness was incurred were tainted with usury, its effect cannot be avoided by taking other paper or security for the indebtedness, including the usurious charge.'"

The case law in Michigan describes the Fishell/Soltow transactions. Every one of the six promissory notes entered into between the parties was at a usurious interest rate. When the notes were consolidated into the amended promissory note of August 25, 1988, the figure for the amended note was arrived at by adding up the principal amounts loaned by Defendant Soltow to Plaintiff Richard Fishell and adding to that all the interest at the various usurious interest rates.

SUMMARY ON USURIOUS INTEREST CLAIMS

The facts set forth by Plaintiffs concerning the usury issue are not disputed. The interest rate charged by Defendants on each of the six loans are set forth in documents prepared by either the Defendant or the Defendant's attorney. Plaintiffs are entitled to summary judgment on the usury issues. This has several results, which are as follows:

1. Defendants are barred from the recovery of any interest, any official fees, delinquency or collection charge, attorney's fees or court costs. MCL 438.32,

supra; (32)

2. The documents signed on August 25, 1988, are of no effect or consequence. Mathews v Tripp, supra, wherein the Court said as follows:

> "If a transaction is usurious in its inception, it remains usurious until purged by a new contract; and all future transactions connected with or growing out of the original are usurious and without valid consideration."

3. Plaintiffs are not and never have been in default of the $350,000 promissory note dated July 8, 1986, or the mortgage given as security for said note. As was pointed out, supra, the note provided for no principal payments until July 7, 1989. Only interest payments were due prior to July 7, 1989 and they were due every six months commencing January 7, 1987 (Plaintiffs' Exhibit 5).

Therefore, when Attorney Austin wrote the demand letter for Defendants Soltow on April 29, 1988, the note and mortgate of July 8, 1986 were not in default. Likewise, when Attorney Austin threatened forfeiture on behalf of Defendant Robert Soltow against Plaintiffs, in his letter of August 12, 1988 (Plaintiffs' Exhibit 15) and enclosed a proposed land contract, Plaintiffs, were not in default of the promissory note and mortgage dated July 8, 1986. Further, when Defendants and Attorney Austin had Plaintiffs sign the documents on August 25, 1988, Plaintiffs were not in default of the note and mortgage of July 8, 1986. Plaintiffs were not in default of the note and mortgage of July 8, 1986, because at all those times mentioned (33) the only payments that had been due from Plaintiffs to Defendants on said note were interest payments. The only demand or charge the Defendants made against Plaintiffs for interest on the $350,000 promissory note were usurious charges and demands. Therefore, Defendants were not entitled to collect any interest on that $350,000 promissory note and with no interest payments collectible, there was no default on the note or mortgage.

4. All of the documents signed by Plaintiffs on August 25, 1988 are null and void. Since no payments were due from Plaintiffs to Defendant on the $350,000 note, there was no default on that note and mortgage. Therefore, since there was no default and in light of the language in Mathews v Tripp, supra, there was no consideration for these documents that were signed on August 25, 1988.

5. Defendant Robert Soltow's remedies are as follows:

(a) Defendant Robert Soltow has an unsecured claim against Plaintiffs for the sum of $4,000 on note #1, dated April 23, 1982 (Plaintiffs' Exhibit 1), because under the cases cited above, any payment made on that note must be deducted as a principal payment and since the Plaintiffs paid $6,000 on November 13, 1983, there is only a $4,000 balance owing. $4,000 in principal and no interest is collectible.

(b) Defendant Robert Soltow has an unsecured claim against Plaintiff R. Fishell for $6,250, on loan #2, being the (34) principal amount of the loan of January 29, 1986 (Plaintiffs" Exhibit 4);

(c) Defendant Robert Soltow has a claim against Plaintiffs for $350,000, being the principal amount of the loan of July 8, 1986. This loan is collateralized by a mortgage on the real estate which I presume that Defendant Robert Soltow could argue that he is entitled to commence foreclosure of that mortgage.

(d) Defendant Robert Soltow has an unsecured claim against Plaintiffs for $10,000, being the principal amount of the loan of July 16, 1987 (Plaintiffs' Exhibit 6).

(e) Defendant Robert Soltow has an unsecured claim against Plaintiffs in the amount of $25,000, being the principal amount of the loan of September 3, 1987 (Plaintiffs' Exhibit 8).

(f) Defendant Robert Soltow has an unsecured claim against the Plaintiff Richard Fishell for $55,000, being the principal amount of the loan of March 24, 1988 (Plaintiffs' Exhibit 9).

To summarize, Defendant Robert Soltow has an unsecured claim against Richard Fishell only on loans 2, and 6 for an amount that totals the principal amount of each of those loans, being $61,250. That Defendant R. Soltow has an unsecured claim against both Plaintiffs on loans 1, 4 and 5 for an amount that (35) totals the principal of those loans, less the $6,000 payment on the first loan, giving a total unsecured claim against both Plaintiffs in the amount of $39,000. Defendant Robert

Soltow has a secured claim against both Plaintiffs and against the subject property for $350,000, being the principal amount of that loan.

6. Plaintiffs shall recover their attorney's fees and court costs from Defendants. (MCL 438.32, supra.

RELIEF

Plaintiffs therefore, under the usurious interest claims, respectfully request this Court to issue a summary judgment for Plaintiffs and against Defendants as set out in this summary. (36)

FACTUAL STATEMENT CONCERNING AUGUST 25, 1988 DOCUMENTS AND EVENTS SUBSEQUENT THERETO.

In order to induce the Plaintiffs to execute the documents of August 25, 1988, Defendant Robert Soltow and Attorney Austin made certain representations to Plaintiff Richard Fishell, including but not limited to:

1. The public as well as any people

that Plaintiff would be dealing with on selling or developing the property would not receive any notice or be aware of the dealings between Plaintiff and Defendant concerning said documents, other than the mortgage modification agreement which Defendant Robert Soltow would record;

2. That said transaction, other than the recording of the mortgage modification agreement, would be kept confidential at least until February 15, 1989. That if the indebtedness was not paid by Plaintiff to Defendant by February 15, 1989, then the deed that was being placed in escrow could be recorded by Defendant Robert Soltow;

3. In a letter dated August 12, 1988 (Plaintiffs' Exhibit 15), from Attorney Austin to Plaintiffs, Attorney Austin advised Plaintiffs they were in default on the $350,000 note of July 8, 1986, as well as the five other loans. Further that under a mortgage foreclosure Plaintiffs'

redemption period would expire prior to the end of January, 1988 (sic). Therefore, Plaintiffs would benefit from signing the proposed land contract because it would give Plaintiffs more time to develop or sell (37) the property and Plaintiffs would avoid any public knowledge that would be brought about by advertising the foreclosure. The land contract approach was dropped by Austin;

4. Then Attorney Austin advised Plaintiff Richard Fishell that if Fishells signed the new set of documents on August 25, 1988, and did not pay off the loans by February 15, 1989, that Defendant Soltow could record the deed that Plaintiffs were placing in escrow. However, Plaintiff R. Fishell was advised by Attorney Austin and understood that the deed was just additional protection for Defendant R. Soltow; that what Defendant R. Soltow had was a mortgage on the property for the increased

amount; and, if Defendant Soltow wanted to get title to the land he would have to foreclose after February 15, 1989, and then Fishell could redeem the property after said foreclosure;

5. Attorney Austin advised Plaintiff R. Fishell and Plaintiff R. Fishell understood that if Plaintiffs did not pay Defendant R. Soltow by the end of any redemption period which would run after a mortgage foreclosure susequent to February 15, 1989, then Defendant R. Soltow would have title to the property;

6. Defendant Robert Soltow represented to Plaintiff Richard Fishell that he just wanted his money repaid and there was a verbal representation made from Defendant R. Soltow to Plaintiff R. Fishell that Plaintiff, Richard Fishell, would be allowed to treat the property as his own and to sell same without any hinderance from Defendant even after the February (38)

15, 1989 date set forth in the escrow holding agreement;

7. That if the indebtednesses were not paid by February 15, 1989, and if Defendant Robert Soltow caused the deed that was placed in escrow from Fishell to Soltow to be recorded, that Plaintiff Richard Fishell could continue to treat the property as his own and to sell same without any hinderance from Defendant. It being represented to Plaintiff R. Fishell by Defendant R. Soltow that he just wanted Fishell to get a chance to either develop or sell the property and pay him what was owed.

The above representations made by Defendant R. Soltow and Attorney Austin were inaccurate and untrue.

That Plaintiffs believed and relied upon said representations in signing the documents on August 25, 1988. That Plaintiffs were deceived by said representations to their detriment in that:

(1) Plaintiffs believed that they were getting really unlimited time to sell and/or develop their property;

(2) Plaintiffs believed Defendants would do nothing to hinder Plaintiffs ' efforts;

(3) Plaintiffs believed that Plaintiff Richard Fishell would be able to continue his efforts to either sell and/or develop said property without hinderance from Defendant even after February 15, 1989;

(4) Plaintiffs believed Defendants were just taking the deed in escrow as additional security for the indebtedness;

(39) (5) Plaintiffs believed that Defendant R. Soltow just wanted to consolidate the loans and be paid on same.

(6) Plaintiffs accepted Austin's representations that the amount owed on all six loans with legal interest was

$610,446.14.

When the above representations were made, Plaintiffs were in privy with the Defendant Robert Soltow in the transactions of August, 25, 1988. Plaintiff was deceived by the representations into signing the documents of August 25, 1988. Defendant R. Soltow has now taken the position that he is the owner of the subject property. Plaintiff has suffered injury and damage due to said misrepresentations, including but not limited to the following:

(1) Defendant Soltow claims to be the owner of the property;

(2) The Property has a value of at least $1,380,000;

(3) Defendant R. Soltow has filed a deed and has informed Plaintiff R. Fishell that Fishell no longer has an interest in the property, except the same right to sell the property as any real estate person would have (R. Soltow's Deposition 3/20/91,

P. 107);

(4) Prior to signing the documents of August 25, 1988, all Plaintiffs owed Defendant R. Soltow on the note and mortgage on said property (transaction of July 8, 1986) was $350,000;

(5) That after the August 25, 1988 transaction with the other five notes consolidated into th amended promissory (40) note of August 25, 1988, together with all the usurious interest on all six loans, the indebtedness which was secured by the mortgage on the subject property rose to $610,446.14. Further that Defendant R. Soltow claimed that that indebtedness continued to increase by at least 15% per year.

That the damages to Plaintiffs by Defendant Soltow's and Attorney Austin's misrepresentations have inured to the benefit of Defendants because they are claiming ownership of th subject property which is worth at least $1,380,000 by actually loaning $350,000 to Plaintiff R. Fishell, for which Defendant R. Soltow took the subject property as security.

Not only were the foregoing representations false when made by Defendant R. Soltow and/or Attorney Austin, but they were known to be false when made or were made in a reckless manner, without any knowledge of their truth and as a positive assertion. That when the representations were made by Defendant Soltow and Attorney Austin they were made with the intention that the representations would be acted upon by the Plaintiffs. As above stated, Plaintiffs in fact relied upon such representations, did act upon said representations and Plaintiffs thereby suffered injuries as set forth above.

Defendant Robert Soltow did not intend, at the time of making the representations or at the time Attorney Austin made the representations, and does not now intend to perform as agreed, as evidence by: (41)

1. The Defendant and Attorney Austin, from and after August 25, 1988, represented to others dealing with the property, including local governmental officials, that Plaintiff Richard Fishell need no longer be dealt with respecting the subject property;

2. Defendant R. Soltow could not have foreclosed on the mortgage and had the redemption period expire prior to the end of January, 1980;

3. Defendant R. Soltow and Attorney Austin caused and Affidavit prepared and signed by Attorney Douglas Austin to be filed on February 7, 1980, with the Register of Deeds. This Affidavit advised the world that by February 15, 1980, Plaintiffs would have no interest in the subject property (Plaintiffs' Exhibit 25);

4. In April, 1989, Attorney Austin prepared and Defendant R. Soltow delivered to Plaintiffs at Plaintiffs' residence a document entitled "Amendment to Note and Escrow Holding Agreement." This document was delivered by Defendant Soltow to Plaintiffs at their residence on April 20, 1989. the document was prepared so that it was purported to have been an agreement of February 15, 1989. The document, among other things, attempted to terminate the verbal agreement that Defendant Soltow had with Richard Fishell regarding the fact that the documents of August 25, 1988 were really security documents and that Fishell could continue to treat the property as his own (42) regarding the development and sale of same. The document (Plaintiffs' Exhibit 26) basically provided as follows:

> 1. The maturity date of the amended promissory note was extended from February 15, 1989 to March 15, 1989;
>
> 2. If Soltow obtains title to the

premises through delivery of the warranty deed from the escrow agent Soltow agrees to reconvey title to Fishells at any time from March 16, 1989 to and through April 24, 1989, in exchange for the payment by Fishells of the $700,000 plus $300 per day from March 16, 1989;

3. The reconveyance from Soltow to Fishell shall be in the form of Exhibit F which was attached to the letter;

4. At the time of reconveyance Soltow shall also deliver to Fishells the mortgage discharge;

5. Defendant Rosalee Soltow joins in this agreement solely for the purpose of consenting to the release of her dower interest in the premises by executing the warranty deed;

6. "This agreement constitutes and merges all of the agreements between the parties arising since August 25, 1988, relative to the escrow holding agreement and the premises and no agreements hereafter arising shall be binding unless in writing and signed by Soltow and Fishells."

7. Except as otherwise amended by the foregoing, this escrow holding agreement shall remain in full force and effect."

This document shows that Defendant R. Soltow and Attorney Austin recognized that all Defendant R. Soltow had was a security agreement. It further recognized that

Plaintiffs were owners of the property and could dispose of same. It recognizes if the documents on their face did not so provide, (43) that Defendant Soltow had verbally agreed to same. Paragraph 6 of the agreement was an attempt to terminate that verbal understanding and eliminate Plaintiffs' continuing interest in the property by April 24, 1989 (four days from the date the document was delivered to the Plaintiffs). Not only was it obvious from this document that there was at least a verbal understanding that Plaintiffs were still the owners of the property after February 15, 1989, it was also obvious there was such a verbal understanding from other documents (Plaintiffs' Exhibits 27, 28 and 29). Those documents are as follows:

1. Plaintiffs' Exhibit 27 is a letter from Robert Soltow to Mr. Leroy D. Scott, First Vice President of Manufacturers Bank in Lansing. The letter is dated February

14, 1989 (but not sent until 2/21/89-see #2 below), and says as follows:

> "I am the holder of a mortgage on 44.319 acres, more or less, in Oneida Township, Eaton County, Michigan, title which is held by Mr. and Mrs. Fishell. I understand from a copy of the February 10, 1989 commitment letter which the Fishells have provided to me, that you will be making a loan for the purpose of paying off this mortgage.
>
> The mortgage has a balance of $652,341.14 as of February 7, 1989, plus per diem interest thereafter at the rate of $250.8682." (Emphasis supplied)

2. Plaintiffs' Exhibit 28 is a letter dated February 21, 1989, from Attorney Austin to the same Mr. Scott, which enclosed the above letter of February 14, 1989 from Defendant Soltow and also enclosed a copy of a discharge of mortgage (44) (Plaintiffs' Exhibit 28A) which Austin would tender the original of at the closing. Mr. Austin asked for a closing date.

3. Plaintiffs' Exhibit 29 is a letter from Austin to Mr. Scott dated March 16,

1989. Also on March 16, 1989, Defendant R. Soltow had caused Austin to have the deed from Plaintiffs to R. Soltow taken out of escrow and recorded in Soltow's name (Plaintiffs' Exhibits 30 & 31). However, Defendant R. Soltow and Austin continued to recognize that Defendant Soltow merely had a mortgage and Plaintiffs were able to sell the property and pay off the mortgage. This is demonstrated by Plaintiffs' Exhibit 29. This letter advises the bank that the pay off figures set forth in Defendant R. Soltow's letter to Mr. Scott on February 14, 1989 (Plaintiffs' Exhibit 27) had expired as of March 15, 1989. The letter requested that Mr. Scott contact Mr. Austin should any closing be scheduled in the future.

When Defendant R. Soltow delivered the proposed amendment to note and escrow holding agreement to the Fishells on April 20, 1989 (Plaintiffs' Exhibit 26), which attempted to terminate Plaintiffs' interest in said property as of April 24, 1989, Plaintiff R. Fishell became very concerned. Plaintiff R. Fishell tried to talk to Defendant R. Soltow on that occasion and Defendant R. Soltow was very evasive. Defendant R. Soltow would not sit down and visit, Defendant R. Soltow was acting very quiet and very unusual. Defendant R. Soltow had never delivered any papers from Austin before. Attorney Austin had called and said Austin had some papers for Plaintiffs to sign (45) and Defendant R. Soltow was at Austin's and Austin would send the papers out by Defendant R. Soltow. Plaintiff Fishell walked Defendant Soltow out to his car and asked Defendant Soltow "can't you talk?" Defendant Soltow's response was either "No, not much" or "No, not very well." Plaintiff R. Fishell did not sign the proposed document. However, because of the language in the document;

because of Defendant's actions or attitude at Fishell's house on April 20, 1989; because now that Defendant Soltow had filed the deed and could not convey back the property without Defendant Rosalee Soltow's signature; and, because of the other things that had transpired (including the meeting called for by Austin that had been held on April 5, 1989, between Austin, his law partner Lowe and Plaintiff R. Fishell), seven (7) days later on April 27, 1989, Plaintiff Richard Fishell filed this lawsuit.

If Defendant R. Soltow or Attorney Austin had made proper representations to Plaintiff R. Fishell, Plaintiff Richard Fishell and Plaintiff Dorothy Fishell, would never have signed the documents on August 25, 1988. Plaintiff Richard Fishell just thought he was being fair in giving Defendant Soltow additional collateral and putting all the debts into the collateralized note and then Plaintiffs could avoid any advertising for foreclosure and be able to develop the property or sell same without any time pressure. Plaintiff Richard Fishell thought the real purpose of the documents of August 25, 1988 was to collateralize the other loans. If Plaintiff Richard Fishell (46) had known what Defendant Soltow and Attorney Austin would end up doing, what they did; or, if Plaintiff Richard Fishell had known about the usurious interest rates, the documents of August 25, 1988 would not have been signed. Plaintiff Richard Fishell had a big hang up that the advertising of any economic pressure on him would greatly adversely affect any deal he might have then, or in the future, regarding developing or selling the subject land. Of course, all of this has been defeated because of the Affidavit filed by Austin on February 7, 1989, and the filing of the deed by Defendant R. Soltow on March 16, 1989. What has happened to the Plaintiffs as a result of Defendant Soltow's misrepresentation, Attorney Austin's misrepresentation and both Austin's and Soltow's conduct is much worse than the publicity of a foreclosure advertisement. Soltow is claiming he owns Plaintiffs' property; Plaintiffs have to litigate to have their property and Plaintiffs have been forced to file for relief in the bankruptcy court, which has been devastating to both Plaintiffs.

If Plaintiffs had only known, they could have avoided all of this. Plaintiff would have sold all or part of the subject land for a price less than $1,300,000 and/or used other assets to pay off Defendant Soltow. Plaintiffs would not lose property worth at least $1,300,000 for a $350,000 loan. (47)

Response to Testimony Relied Upon by Defendants in their Brief in Support of

Motion for Summary Judgment

In response to Defendants' Brief in support of their Motion for Summary Judgment, it shold be noted that Defendants rely primarily on the testimony taken before Circuit Judge Eveland on Plaintiffs' Motion to Disqualify the Fraser firm from representing Defendants. There has never been a hearing on the merits of the case before Judge Eveland and so the testimony relied upon by Defendants from those hearings is very limited. Further, what they have presented to the Court is not accurate from the whole transcript of the two hearings.

Although Defendants spent a great deal of time pointing out that Judge Eveland did not think the Fraser firm should be disqualified, Plaintiffs will not belabor those conclusions by Judge Eveland, since that is not the issue presently before this Court. Plaintiffs will only point out to the Court that Plaintiffs' appeal to the Michigan Court of Appeals and to the Michigan Supreme Court were on an interlocutory order and the appeals were by application for leave and not as a matter of right. The Courts merely declined to hear the appeals at that time. However, the Court of Appeals decision to decline hearing the appeal was a 2-1 split with Judge Kelly voting to grant leave to appeal, grant motion for stay and take the motion for peremptory reversal under advisement (Defendants' Exhibit I). It should also be pointed out that Judge Eveland said: "The Court also has searched the record for any information that (48) Austin obtained within his confidential relationship with Soltow (sic) that would prejudice Soltow (sic) in this case." The Court when on to say:

> "I find no basis to believe that there was a reasonable probability that confidences were disclosed

> which could be used against Fishell. In order to find that there was a probability the Court would have to conclude that Fishell believed that Austin represented him and not Soltow on the mortgage transaction. The evidence offered is insufficient and non-credible." (Defendants' Exhibit H).

The Court concluded that he could find no breach of professional ethics by the Fraser firm in representing the Defendants and accordingly denied the motion. It is of note that prior to Judge Eveland's decision Eaton County Circuit Judge Shuster granted a similar motion by Fishells to disqualify the Fraser firm from representing Mr. Soltow in another case pending in Eaton County that involved Fishell and Soltow, "In the Matter of the Complaint of the Eaton County Drain Commissioner for the Condemnation of Private Property for the Reed Drainage District in Oneida Township, Eaton County, Michigan," Docket No. 89-377-CC.

The first hearing date on Plaintiffs'

Motion to Disqualify the Fraser firm was October 4, 1989, and it was continued on February 27, 1990. These were not hearings on the merits and the Judge advised the attorney for Plaintiffs to only deal with the disqualification issue and not the merits of the case (Tr. 10/4/89, Pp. 61, 78; Tr. 2/27/90 Pp. 84, 85, 93, 94). (49) So when Defendants' counsel points out testimony that was obtained from Plaintiff Fishell that dealt with the merits, the record is very limited. However, that transcript does support Plaintiff Fishell's position in numerous aspects, including (Tr. 2/27/90):

1. Plaintiff Fishell was concerned when he received the April 29, 1988 letter from Attorney Austin demanding payment on the notes and thratening mortgage foreclosure (Plaintiffs' Exhibit 7, Tr. P. 61);

2. Plaintiff Fishell relied on Attorney Austin as to what he should do to avoid any advertising of said foreclosure and followed Attorney Austin's advice on signing the papers on August 25, 1988

(Tr. Pp. 60 & 61);

3. Plaintiff Fishell relied on Attorney Austin's advice set forth in Austin's letter of August 12, 1988 (Plaintiffs' Exhibit 15), that Plaintiffs would only have a six month redemption period that would expire prior to the end of January (Tr. Pp. 59 & 60);

4. That Attorney Austin did not explain the pros and cons of signing the "renewal" documents on August 25, 1988 (Tr. P. 59);

5. That Attorney Austin did explain to Plainiff Fishell that if Fishells signed the documents on August 25, 1988 that the sole benefit Fishells would receive is that they would avoid advertising (Tr. P. 23 & 73);

6. That Attorney Austin did not tell Plaintiff Fishell what the benefits of the August 25, 1988 documents were to Defendant Soltow (Tr. P. 73);

7. That Attorney Austin represented to Plaintiff Fishell that if Fishells signed the documents on August 25, 1988 that Defendant Soltow would still have to foreclose on the mortgage and Plaintiff Fishell would be able to buy it back during the redemption period (Tr. Pp. 62, 63); (50)

8. That Plaintiff Fishell undertood when he signed the documents on August 25, 1988 that if Plaintiff Fishell did not pay Defendant

Soltow would receive a deed to the property (Tr. P. 68);

However, Plaintiff Fishell also understood that the deed was just additional protection and what Defendant Soltow had was a mortgage on the property for the increased amount; and, if Soltow wanted to get title to the land he would have to foreclose and Fishell could redeem (Tr. Pp. 67, 68, & 63);

9. Plaintiff Fishell understood that if Soltow did foreclose on the deed and mortgage after February 18, 1989 and if Plaintiff Fishell did not redeem during the redemption period, that at the end of the redemption period Plaintiff Fishell would lose the land (Tr. P. 63);

10. That even after the deed was taken out of escrow, given to Defendant Soltow and recorded, Defendant Soltow kept telling Plaintiff Fishell to sell the property and pay off Soltow's loans, "All I want is my money" (Tr. P. 64);

11. That Attorney Austin never told either Plaintiff that he was not looking out for their interest when the documents of August 25, 1988 were signed and never suggested to them that they should have another attorney review the documents or advise them (Tr. Mr. Fishell, P. 46 60; Mrs. Fishell, P. 114 & 115);

12. Attorney Austin testified that he knew Plaintiff R. Fishell felt he had an attorney/client relationship with Austin; and that Plaintiff R. Fishell had confidence and trust in Attorney Austin (Tr. 10/4/89, P. 106);

13. Attorney Austin nor Defendant Soltow ever explained the usurious interest rates being charged by Soltow to Fishell on all six notes when they were consolidated into one with the amended note of August 25, 1988 (Tr. 10/4/89, P. 106; also see Austin's Deposition of 3/20/91, P. 59). (51)

ARGUMENT

THE DEFENDANT R. SOLTOW'S AND ATTORNEY AUSTIN'S MISREPRESENTATION, CONDUCT AND FAILURE TO DISCLOSE CERTAIN FACTS CONSTITUTED ACTUAL FRAUD, INNOCENT MISREPRENTATION, AND SILENT FRAUD.

United States Fidelity and Guaranty Co v Black (1981) 412 Mich 99; 313 Nw2d 77 sets forth a very thorough discussion on actual fraud (traditional fraud), innocent misrepresentation (constructive fraud) and silent fraud. Under Michigan law the misrepresentations made by Defendant R. Soltow and Attorney D. Austin constitute both innocent misrepresentation and actual fraud. The withholding of information, including but not limited to, the usurious interest rates charged on the six loans discussed previously and consolidated into the note of Agusut 25, 1988, and the failure to disclose Defendants' position on the title passing to Defendant once the deed was removed from escrow, without the need of foreclosure, were nondisclosures that constitute silent fraud.

Page 114 of the Black case, supra, sets forth the general rule for actual or traditional fraud, quoting from Candler v Heigho, 208 Mich 115, 121; 175 NW 141 (1919) as follows:

> "'The general rule is that to constitute actionable fraud it must appear: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knwledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon (52)

> by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery.'"

Then on Page 116 of Black case, supra, the Court said as follows:

> "The rule of 'innocent misrepresentation' is well expressed in a passage from Phillips, supra, p 20, quoting 23 Am Jur, Fraud and Deceit, Sec 120, p. 908, reincorporated in 37 Am Jur 2d, Fraud and Deceit, Sec 195, p. 257:
>
> 'The minority rule is followed in at least one state in a slightly more specific formulation; it is held that where an action is brought to recover for false and fraudulent misrepresentations made by one party to another [1] in a transaction between them, [2] any representations which are false in fact [3] and actually deceive the other, and [4] are relied on by him to his damage, are actionable, irrespective of whether the person making them acted in good faith in making them, [5] where the loss of the party deceived inures to the benefit of the other.'"

Then on Page 117 of the Black case, supra, the Court said as follows:

> "In comparing the traditional common-law rule as stated in the Court of

Appeals opinion with the innocent misrepresentation rule set forth in American Jurisprudence, several significant differences appear.

1. The innocent misrepresenation rule occurs [1] in a transaction between the contracting parties, whereas no such requirement appears in the traditional rule. The instant case of course involves a contract of indemnity.

2. The requirement of scienter, i.e., knowledge of the falsity of the misrepresentation, is present in the traditional rule (3) but not present(53) in the innocent misrepresentation rule [3] and [4]. The Court of Appeals correctly recognized this.

3. The traditional misrepresentation rule requires (4) that the misrepresentation be made with the intention that it should be acted upon by the victim. The innocent misrepresentation rule has no such requirement. The quotation from American Jurisprudence states [4] 'irrespective of whether the person making them acted in good faith in making them'. As to this point, of course, the Court of Appeals applied the traditional instead of the 'innocent' misrepresentation rule. We shall discuss this further almost immediately.

4. Under the traditional misrepresentation rule, it is sufficient that the victim (6) suffer an injury. Under the innocent misrepresentation rule, the victim [5] must not only suffer an injury but also the injury must inure to the benefit of the

other."

In dicussing silent fraud, Black, supra, on Page 125 stated as follows:

> "It is generally recognized that '[f]raud may be consummated by suppression of facts and of the truth, as well as by open false assertions', Fred Macey Co v Macey, 143 Mich 138, 153; 106 NW 722 (1906), since 'a suppression of the truth may amount to a suggestion of falsehood'. Stewart v Wyoming Cattle Ranche Co, 128 US 383, 388; 9 S Ct 101; 32 L Ed 439 (1888). In order for the suppression of information to constitute silent fraud there must be a legal or equitable duty of disclosure. See 37 Am Jur 2d, Fraud and Deceit, Sec 146."

In Wolfe v A. E. Kusterer & Co (1934) 269 Mich 424, 427; 257 NW 729, the Court made the following comments concerning silent fraud:

> "'Fraud may be consummated by suppression of facts and of the truth, as well as by open false assertions.' Fred Macey Co. v Macey, 143 Mich 138, 153 (5 L.R.A. [N.S.] 1036). (54) 'In an action of deceit, it is true that silence as to a material fact is not necessarily, as a matter of law, equivalent to a false representation. But mere silence is quite different from concealment; aliud est tacere,

> aliud celare; a suppression of the truth may amount to a suggestion of falsehood; and if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, when he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party.' Stewart v. Wyoming Cattle Ranche Co., 128 U.S. 383, 388 (9 Sup. Ct. 101)."

Under the Michigan cases, when discussing actual fraud, innocent misrepresentation or silent fraud, the Court shall grant whatever relief is appropriate under the circumstances, including equitable reliefs such as reformation, restitution or partial enforcement of the contract, and the Court can award damages. The equitable relief can include damages, they are not alternative reliefs. In Essenburg v Russell (1956) 346 Mich 319, 323; 78 NW2d 136, the Court said as follows:

> "In Holcomb v Noble, 69 Mich 396, it was held that:
>
> 'The doctrine is settled in this State that if there was in fact a misrepresentation, though made innocently, and its deceptive influence was effective, the consequences to the plaintiff being as serious as though it had proceeded from a vicious purpose, he would have a right of action for the damages caused thereby either at law or in equity.'" (Citation of cases omitted)

In determining the existence of reliance under actual fraud the misrepresentation need only exert a material influ-

(55) ence. In the Black case, supra, at Page 121, the Court said as follows:

> "It is well settled in Michigan that the test for determining the existence of reliance is not whether the misrepresentation was the sole influence upon the complaining party in deciding to sign the agreement but rather is 'whether the * * * misrepresentation exerted a material influence upon the minds of [the complainants], although it might be only 1 of several motives, acting together, which produced the result'. Callihan v Talkowski, 372 Mich 1, 6; 124 NW2d 788 (1963) (emphasis added)."

In the Black case, supra, at Page 134 the Court said as follows:

> "The defenses of innocent misrepresentation and silent fraud are not based in law but in equity. The equitable court awarding a remedy must look to the most just result. Therefore, should the court on remand find there was innocent misrepresentation or silent fraud it must decide which remedy would be the most equitaable under the unique circumstances of the case. The court is not confined to the polar opposite remedies urged by the opposing parties: full enforcement or total abrogation of the indemnity agreement. Other remedies, such as reformation, restitution, or partial enforcement of the contract, may be examined. We leave the resolution of the proper remedy, if any, to the court below."

Plaintiffs have set forth facts which clearly demonstrate that each element of actual fraud, each element of innocent misrepresentation and each element of silent fraud have been proven. Plaintiffs have proven by documents and deeds that Plaintiffs are entitled to summary judgment as to innocent misrepresentation and silent fraud. (56)

CONCLUSION

Defendant R. Soltow and Attorney

Austin have committed actual fraud, innocent misrepresentation and silent fraud on Plaintiffs. As further demonstration of Defendant R. Soltow's greed and overreaching, Plaintiffs would refer the Court to Plaintiffs' Exhibit 26 and 27. Exhibit 27 was the letter from Defendant Soltow to Mr. Scott at Manufacturers Bank regarding a transaction by Plaintiff R. Fishell. Defendant R. Soltow was looking to have his note and mortgage paid off by a deal Plaintiff R. Fishell was engaged in through the bank. In this letter, Defendant R. Soltow advised the bank that the pay off on his mortgage from Fishells was $652,341.14 as of February 7, 1989, plus per diem interest thereafter at the rate of $250.8682. This figure was the $610,446.14 on the note of August 25, 1988 (including all the usurious interest from the six consolidated loans) together with interest at 15% per annum since August 25,

1988. Assuming for purpose of argument that the $610,446.14 was correct, then the balance owing as of February 7, 1989 and the per diem rate were accurately stated. Then Exihibit 26 (the proposed "Amendment to Note and Escrow Holding Agreement, which Defendant Soltow delivered to Plaintiffs' home on April 20, 1989) provides that if Defendant Soltow obtains title to the property through the warranty deed that was in scrow, Soltow agreed to convey back to Plaintiffs at any time from March 16, 1989 to and through April 24, 1989 "in exchange for payment by Fishells of the sum of $700,000.00 plus $300 per day from March 16, 1989 to and through the date of reconveyance." (57)

This means that the mortgage pay off went from $652,341.14 from February 7, 1989 to March 16, 1989. This is an increase of $47,658.86 in 37 days. That is $1288.08 per day, which translates into an interest on a annual basis (365 x 1288.08) of $470,148.17. $470,148.17 for one year's interest on $610,446.14 is an interest rate of 77.02% ($470,148.17 divided by $610,446.14). In addition the $300 per diem that was going to be charged after March 16, 1989 is $109,500 per year, which is an effective interest rate from March 16, 1989 of 17.94% per annum.

This means that "this highly respected businessman," Defendant R. Soltow, and Attorney Austin were not content in charging Defendant Soltow's neighbor and friend, Plaintiff R. Fishell $160,000 in usurious interest on Agusut 25, 1988 ($610,446.14 - $450,250, being the principal indebtedness by Plaintiffs to Defendant R. Soltow on all six loans). On April 20, 1989, they attempt to gouge him another $47,658.86 in 37 days (77.02% interest) and then continue to gouge at 17.94% interest after March 14, 1989 (when the interest rate on the note was 15%).

As indicated, Defendant R. Soltow's and Attorney Austin's misrepresentations and subsequent conduct have damaged Plaintiffs in numerous respects, which include the following:

(1) Plaintiffs have improperly had five unsecured loans grouped in with the $350,000 loan;

(2) Plaintiffs have been charged usurious interest rates on all six loans; (58)

(3) Plaintiffs could have done something with this property in the spring of 1989, particularly without being charged the usurious interest rates;

(4) Plaintiffs have been without the oportunity (sic) to sell or develop the subject property, without hinderance from Defendant R. Soltow from at least as early as February 7, 1989;

(5) The inability to develop or sell

the subject property has so destroyed Plaintiffs' economic condition that, among other things:

(a) Plaintiffs had the Andre property, which is adjacent to this property and necessary to this property for a drainage easement, foreclosed at a price approximately $100,000 in excess of what Plaintiffs would have had to pay under a settlement of the mortgage on the Andre property;

(b) Plaintiffs watched Defendant R. Soitow purchase the Andre property, except for two residential lots, at the foreclosure sale for approximately $225,000 leaving the Plaintiffs with a deficiency of approximately $80,000. Further, the attorney for Andre has threatened in Court that he was going to try to get Plaintiffs out of the protection of the bankruptcy court and attach their home in Clinton County for satisfaction of said deficiency;

(c) Plaintiffs were forced to file for relief under Chapter 11 of the Bankrupcy Act, which was devastating;

(d) Plaintiffs' credit, reputation, business opportunity and credibility together with their standing in the community have been destroyed;

(e) Plaintiffs' income situation has been destroyed to the extent that Plaintiff R. Fishell's only life insurance policy ($300,000) lapsed;

(f) Plaintiffs will have real estate sold for taxes this month; (59)

RELIEF

Plaintiffs respectfully request the same relief that was requested under the usury issue together with damages against Defendant R. Soltow. Plaintiffs are entitled to a summary judgment at least on innocent misrepresentation and silent fraud. Under silent fraud both Attorney Austin and Defendant R. Soltow admit that they did not inform Plaintiffs of the usurious interest being charged on the six loans, which was carried over and consolidated into the amended note of August 25, 1988.

Plaintiffs are therefore entitled to a summary judgment on this issue with the relief the same as prayed for under the usury issue, together with damages for the fraud. Plaintiffs would be entitled to offer proofs on the amount of damages they are entitled to after entry of summary judgment on silent fraud. (60)

THE WARRANTY DEED PLACED IN ESCROW ON AUGUST 25, 1988 IS CONSTRUED AS A MORTGAGE

In addition to the facts previously set forth in this Brief, they are several other facts that require the warranty deed to be construed to be a mortgage:

1. There was no new consideration.

   (a) The amended note consolidated six usurious loans and advanced no new dollars;

   (b) Defendant R. Soltow may claim forebearance as consideration to Plaintiffs. There was no forebearance. Under the documents of August 25, 1988, Plaintiffs had until February 15, 1989 to pay off not only the $350,000 but now $610,446.14. If Defendant R. Soltow had started foreclosure in August 1988, Plaintiffs would have had until at least September 15, 1989, some seven months more than granted to them under the documents of August 25, 1988 (even assuming for purpose of argument that Attorney Austin was correct and there was only a six month redemption period, Plaintiffs would have had four weeks until sale, i.e. until September 15, 1988 and then six months to redeem, being March 15, 1989); of course, we must assume if foreclosure would have been commenced it would have taken substantially longer because Plaintiffs would have been forced to see an attorney other than Austin and the foreclosure by advertising (61) would have been enjoined, if for no other reason, than because of the usurious interest being charged by Defendant R. Soltow;

(c) Defendant R. Soltow may claim that the consideration was Defendant giving up his right to a deficiency against Plaintiffs on the $350,000 loan and mortgage of July 8, 1986. This is no consideration. The property was worth at least $1,380,000 (according to Soltow's notes $1,500,000) and so no real risk of deficiency;

(d) Defendant R. Soltow may claim that the consideration Plaintiffs received was the consolidation of their loans with Defendant Soltow. Plaintiffs did not seek this and it was not to their benefit but to the benefit of Defendant Soltow. Defendant included five usurious, unsecured notes with the $350,000 usurious note and they were all now collateralized by the amended mortgage on the subject property.

2. The documents of August 25, 1988 in no way set out a clear expression of the release of the right of redemption (statutory or common law). The two conclusions from this very important omission is: (1) either the parties intended the transaction of August 25, 1988 to be a security agreement only; or, (2) Austin and Defendant Soltow knew Plaintiffs would never sign the documents if this were expressed. (62)

3. Plaintiffs' Exhibit 21, Declaration of Storm Drain Easement, provides that Plaintiffs' duty to maintain the property will cease if Defendant R. Soltow "takes title to Parcel one through foreclosure or through deed in lieu of foreclosure." Including the language through foreclosure supports Plaintiffs' position that the transaction of August 25, 1988, was for security only; further, any ambiguity would be resolved against Defendants,

since drafted by them.

4. Prior to the commencement of this suit, one would believe that Defendant R. Soltow intended to have only security for the repayment of his loans; except for: (1) Defendant Soltow's actions when he delivered Plaintiffs' Exhibit 26 to Fishells on April 20, 1989, (2) the contents of that document and (3) the meeting Plaintiff R. Fishell had with Attorneys Austin and Lowe on April 15, 1989.

5. In Defendant R. Soltow's deposition of 3/20/91, Pp. 86-88, he testified that on August 23, 1988 his desire was to be paid what was owed. However, after the documents were signed on August 25, 1988 his desire changed because "the signed documents presented, to me, legal remedies to the default that existed."

The law in Michigan is well settled. Any attempt or agreement purporting to destroy or impair the mortgagor's right of redemption is invalid. In an early Michigan case that is often cited and quoted, the Court set forth the basic rule in Michigan, Batty v Snook (1858) 5 Mich 231, 239:

> "Once a mortgage always a mortgage, may be regarded as a maxim of the court. Equity is jealous of all contracts between mortgagor and mortgaee, by which the equity of redemption is to be shortened or cut off. (63) The mortgagor may release the equity of redemption to the mortgagee for a good and valuable consideration, when done voluntarily, and there is no fraud, and no undue influence brought to bear upon him for that purpose by the creditor. But it can not be done by contemporaneous or subsequent executory contract, by which the equity of redemption is to be forfeited if the mortgage debt is not paid on the day stated in such contract, without an abandonment by the court of those equitable principles it has ever acted on in relieving against penalties and forfeitures."

This principal is expanded upon in Emerson v Atwater, (1859) 7 Mich 12, on Page 24, wherein the Court held:

> "Courts of equity frequently set aside deeds and other contracts

between trustee and cestui que trust, attorney and client, guardian and ward, and parent and child, and other like cases, when it has reason for believing the relation between the parties has been abused, when such deed or contract, had it been between parties not so related, would have been held good. The principle the court goes on in cases of debtor and creditor, is the same as in the cases we have just mentioned. The difference is in its application only. In these last cases it is to prevent the abuse of a confidence which the relation implies. In the case of debtor and creditor, the abuse of the power of coercion which a creditor sometimes, by the force of circumstances, has over the debtor. So sensible are court's of the existence of this power, and of its abuse, and that debtor and creditor do not at all times stand on an equal footing, that the borrower, says Judge Story, 'has been significantly called the slave of the lender:' 1 Story's Eq. Juris., s302. And Judge Green, in Fuller v Parish, says: 'Mortgages, and conveyances intended to operate as mortgages, are generally given by the necessitous to the more opulent, the debtor to the creditor, the borrower to the lender, the suppliant for power (64) to him who has power to make the terms upon which it shall be granted. The man whose property is about to be sacrificed by a creditor, will not

> hesitate in regard to the amount of security to be given, nor the manner of giving it, if he can loan the money to satisfy the debt, or otherwise gain time for its payment. He will not hesitate to execute a deed, or bill of sale, absolute upon the face of it, but intended to operate as a mortgage, to four times the value of the loan, without insisting upon a written deed of defeasance:' 3 Mich., 217."

The next maxim in Michigan law has set forth by Justice Cooley in Ferris v Wilcox (1883) 51 Mich 105; 16 N.W. 252. On Page 108 of that case, Justice Cooley set forth the basic facts as follows:

> "Looking, then, at the position of the parties when these papers were executed, we find the defendant debtor and mortgagor to the plaintiffs for a certain sum of money. He deeds them the land, and they surrender to him the evidences of his indebtedness. But they immediately give him a writing promising to reconvey to him the same land provided he shall pay to them a sum of money which corresponds exactly to the sum before owing. Meantime, until default in payment, they leave him in possession an enjoyment of the land as before."

Then later on Page 108, the Justice Cooley says:

> "If, upon the face of the papers examined in the light of surrounding facts, there were any doubt of the intent, the law, taking notice of the advantage of the creditor must always have over his debtor whose property he holds in mortgage, would give the debtor the benefit of the doubt, and hold his equity of redemption to be still existing." (Cited cases omitted; emphasis supplied)
>
> "But there is no such doubt in this case. It is entirely clear that the plaintiffs have simply given up certain papers which (65) secured debts, and have taken a new paper for the payment of the same amount, and in the last paper, as much as in the first, they are creditors of defendant, holding securities from him and his absolute pomise to pay what is owing them."

Koenig v Van Reken (1979) 89 Mich App 102, 105; 279 NW2d 590, the Court said as follows:

> "At no time during the negotiations that led to the execution of these documents was plaintiff represented by an attorney, and all three documents were prepared by Stanley Van Reken."

The Court thought that this was significant even though there is nothing in the case to indicate that Defendant Stan ley Van Reken was an attorney. In the case at bar, Attorney Austin claims that he prepared these documents for his client, Defendant R. Soltow. So if it was significant that Koenig was not represented by an attorney when the other party to the transaction did not have an attorney, it is doubly significant in this case.

The Court went on to quote earlier Michigan cases on the nature and purpose of equitable relief in cases of this nature in Michigan. Further, on Page 106 the Court said as follows:

> "The court of equity protects the necessitous by looking through form to the substance of the tansaction. Although no set criterion has been established, the controlling factor in determining whether a deed absolute on its face should be deemed a mortgage is the intention of the parties. Sheets v Huben, 354 Mich 536; 93 NW2d 168 (1958), Miskinis v Bement, 301 Mich 365; 3 NW2d 307 (1942). Such intention may be gathered from the circumstances attending the transaction includ- (66)

> ing the conduct and relative economic positions of the parties and the value of the property in relation to the price fixed in the alleged sale. 59 CJS, Mortgages, ss35, 36, pp 69-3-73. Under Michigan law, it is well settled that the adverse financial condition of the grantor, coupled with the inadequacy of the purchase price for the property, is sufficient to establish a deed absolute on its face to be a mortgage. Ellis v Wayne Real Estate Co, 357 Mich 115; 97 NW2d 758 (1959), McLaughlen v Majestic Development Corp, 247 Mich 498; 226 NW 256 (1929)." (Emphasis supplied)

In the case at bar, Plaintiffs were indebted to Defendants in the principal amount of $350,000 on note #3, which was secured by a mortgage on the subject property. To give a "deed" in escrow to pay off a $350,000 note with property that was worth at least $1,380,000 certainly lead to the conclusion that the inadequacy of the purchase price for the property is sufficient to establish this deed absolute on its face to be a mortgage.

The Michigan case of Russo v Wolburs (1982) 116 Mich App 327; 323 NW2d 385 has directly dealt with the distinction between equity of redemption (prejudicial sale often referred to as clogging the equity, as opposed to the right of redemption, which is a statutory remedy after the sale) and recognizes that Michigan adheres to the doctrine against clogging the equity of redemption. The Court cites the Batty case, supra, when reaching this conclusion.

On Page 337 of the Russo case, supra, the Court observes that Michigan Courts have consistently given careful scrutiny to any transaction in which the mortgagor waives any (67) alleged equitable or statutory right of redemption citing Nusbaum v Shapero, 249 Mich 252; 228 NW 785 (1930), Hazeltine v Granger, 44 Mich 503; 7 NW 74 (1880).

Also on Page 338, the Court said as

follows:

> "As indicated, any contract by which the mortgagor sells or conveys his interest to the mortgagee is viewed suspiciously and is carefully scrutinized by an equity court. The exchange must be fair, frank, honest, and without fraud, misconduct, undue influence, oppression or unconscionable advantage of the poverty, distress or fears of the mortgagor. Barr, supra. In other jurisdictions, courts have taken positions similar to Michigan's with regard to clogging. A mortgagor's right of redemption can be defeated only by a subsequent agreement upon new consideration. A mortgagee may not contract with the mortgagor at the time of the loan for waiver of redemption rights." (Emphasis supplied)

In the case at bar there was no new consideration. The documents of August 25, 1988 in no way set out a clear expression of the release of the right of redemption (statutory or common law). Plaintiffs' Exhibit 21, Declaration of Storm Drain Easement, recognized that Soltow might take title to this property through foreclosure. The debt of $350,000 on the property was minimal compared to the value of at least $1,380,000. The only attorney present at the signing of these documents and the only attorney that reviewed these documents was attorney Austin. On March 24, 1988, Defendant Soltow had graciously loaned Plaintiff Richard Fishell $55,000. Then on April 29, had attorney Austin accelerate all loans and make a demand and (68) threaten foreclosure. Defendant Soltow knew that the property was just to the point where Plaintiff could benefit from the development or sale of the property. Defendant Soltow attempted to buy the property from Plaintiff and was refused. Then Defendant Soltow, through Attorney Austin, recommended these documents as a way to keep any foreclosure from being advertised and to "gain more time for Plaintiffs: than what Plaintiffs would obtain if foreclosure was commenced. All of these matters are uncontested. These certainly create a situation where a court of equity must determine that the documents signed on August 25, 1988, were for security purposes. Just under this issue, Plaintiffs are entitled to have a court of equity draft the necessary relief to provide a fair and just treatment to the Plaintiffs. See United States Fidelity & Guaranty Co v Black, supra, wherein at p. 134, the Court stated:

> "The equitable court awarding a remedy must look to the most just result."

RELIEF

Fair and just treatment to the Plaintiffs under this issue would best be srved by the Court awarding Plaintiffs the same relief they requested under the usury issue, together with damages for the Plaintiffs being deprived of the right to sell and/or develop the subject property since February 7, 1980. Plaintiffs should receive a summary judgment, under this issue, in the same form as prayed for under the usury issue. Then Plaintiffs should be given the opportunity to offer proofs on damages against said Defendant Robert Soltow. (69)

THE PAROL EVIDENCE RULE IS NOT APPLICABLE IN THIS CASE.

None of the cases cited by Defendants under Argument 3 of their Brief, dealing with the parol evidence rule, are applicable in this case. Defendants failed to make a fair and accurate presentation of the law concerning the parol evidence in a case of this nature. In NAG Enterprises v All State (1979) 407 Mich 407, 410; 285 NW2d 770, the Court said as follows:

> "The Court went on to discuss Goodwin, Inc. v Orson E. Coe Pontiac, Inc. 392 Mich 195; 220 NW2d 664 (1974), and Union Oil Co of California v Newton, 397 Mich 486; 245 NW2d 11 (1976), and concluded that the test for applying the parol evidence seeks to contradict the terms of the written instrument.
>
> This analysis overlooks the prerequisite to the application of the parol evidence rule: there must be a finding that the parties intended the written instrument to

> be a complete expression of their agreement as to the matters covered. Extrinsic evidence of prior or contemporaneous agreements or negotiations is admissible as it bears on this threshold question of whether the written instrument is such an 'integrated' agreement."

There is no language in any document signed on August 25, 1988, saying that any document is an integrated agreement. The NAG case would be controlling and the parol evidence would be permitted.

However, all that analysis is not necessary. There is no parol evidence being offered under the usury issue; that's (70) all written documents prepared by either the Defendant or his attorney.

Parol evidence is always admissible in a claim of fraud, therefore, parol evidence would be allowed under the fraud issue of this brief. Rood v Midwest Matrix Mart, Inc, 350 Mich 559, 564-567; 87 NW2d 186 (1957); Schupp v Davey Tree Expert Co, 235 Mich 268, 271, 209 NW 85 (1926). This exception was recognized on

Page 410 of the NAG Enterprises case, supra. See U. S. Fidelity & Guaranty v Black, supra.

In addition, the parol evidence rule does not prohibit oral proof that the deed executed on August 25, 1988, was given to secure a loan. Selik v Goldman Realty Co (1927) 240 Mich 612, 614, 216 NW 422, wherein the Court said as follows:

> "The law is well settled that oral proof is permissible to show that a deed was given to secure a loan and therefore in legal effect operated only as a mortgage."

(argument re summary judgment, deleted, p. 71-75)

(76) SUMMARY

Under the usury issue, Plaintiffs have shown that the Defendant and Attorney Austin charged Plaintiffs usurious interest rates on all six loans and that that usury was carried over into the amended promissory note dated August 25, 1988. Under the fraud issue, Plaintiffs have shown that Defendant Robert Soltow by himself and through Attorney Austin is guilty of actual fraud, innocent misrepresentaton and silent fraud. There is no question that Plaintiffs have shown silent fraud sufficiently to require summary judgment on behalf of Plaintiffs. Plaintiffs have also shown innocent misrepresentation by documents and testimony that is not controverted by Defendants. In fact, Defendant Soltow's testimony supports Plaintiffs' position in this respect when he indicates that August 23, 1988 all he wanted was his money back but then that changed after the documents were signed on August 25, 1988, because he saw what legal remedies he now had. Plaintiffs believe they have also shown acutal fraud with the uncontested facts that they have set forth. However, it is only necessary that the Court find either actual fraud, innocent misrepresentations or silent fraud in order to enter a summary judgment for Plaintiffs on the fraud issue. The only thing that would be left to take proofs on regarding the fraud issue would be the amount of damages sustained by Plaintiffs.

Plaintiffs have also shown that the so-called deed placed in escrow on August 25, 1988, was really a document for (77) security purposes. These facts have also been shown by documentation and by uncontroverted evidence and Plaintiffs are entitled to a summary judgment as to this issue. The only matter left for proofs for the Court on this issue would be concerning the damages Plaintiffs are entitled to for Defendant Robert Soltow's conduct.

Plaintiffs would refer this Court to Cullins v Magic Mortgage, Inc, (1970) 23 Mich App 251; 178 NW2d 532 the Cullins case, supra, sets forth a very appropriate analysis for the case at bar. The

Cullins case discusses the combination of usury and equitable mortgage. Commencing on Page 256 the Court said as follows:

> "The plaintiffs contend that since the defendants knew of plaintiffs' plight, an equitable mortgage was imposed upon them regardless of the form of the transaction. We agree.
>
> The trial court erred as to the law. He has, and we are, bound by the decision of our Supreme Court in Wilcox v Moore (1958), 354 Mich 499. Although the transaction between the plaintiffs and defendants did not take the form of a loan, neither did the transaction before the Court in Wilcox, supra. Yet, an an equitable mortgage was established with resultant application of the law of usury." (Emphasis supplied)

In the case at bar, the Defendant well knew Plaintiff's' plight when the transaction of August 25, 1988 took place. Not only do Plaintiffs have an equtiable mortgage with an application of the law of usury, Plaintiffs have fraud, equitable mortgage and the application of the law of usury. (78)

The Cullins Court, supra, has other

language that this Court should keep in mind while reviewing this case. On Page 257 of the Cullins case, the Court went on to say:

> "The Court in Wilcox, supra, said on pp 504, 505:
>
> 'There is no need, at this late date in the law of ususry (sic) (see Leviticus 25: 35-37; Deuteronomy 23: 19, 20; Saint Chrysostom's Fifth Homily on the Gospel of St. Matthew; CL 1948, Sec 438.52 [Stat Ann Sec 19.121]) to discuss its rationale. Suffice to say that its purpose is to protect the necessitous borrower from extortion. In the accomplishment of this purpose a court must look squarely at the real nature of the transaction, thus avoiding, so far as lies within its power, the betrayal of justice by the cloak of words, the contrivances of form, or the paper tigers of the crafty. We are interested not in form or color but in nature and substance." (Emphasis added)

The above quote is applicable on every aspect of this case. We have usury on six loans which Defendant Robert Soltow attempted to camouflage into a new amended note on August 25, 1988. In trying to hide, bury or cover up the prior usury, Defendant Robert Soltow and Attorney Austin put a 15% interest rate on the amended note of August 25, 1988, not the 15% interest shifting to 20% interest, as was done on the July 8, 1986 note. Then Defendant Soltow and Attorney Austin prepared all these papers on August 25, 1988 which in effect do nothing to benefit Plaintiffs and attempt to create an unconscionably improved position for Defendant Soltow. With a subsequent agreement such as August 25, 1988, the cases require under usury, and equitable mortgage, that the Court must "look squarely at the real nature of the transaction" and avoid "paper tigers of the crafty." (79)

RELIEF

A summary judgment for Plaintiffs on the usury issue and the fraud issue would entitle Plaintiffs to all the relief requested herein. Summary Judgment for Plaintiffs on the usury issue and the equitable mortgage issue would entitle Plaintiffs to all the relief requested herein. Summary Judgment on behalf of Plaintiffs on all three issues, usury, fraud and equitable mortgage, would entitle Plaintiffs to all the relief requested herein. Summary Judgment on just the usury issue would entitle Plaintiffs to all the relief requested herein except damages for fraud or damages under the Court's equitable authority in the equitable mortgage issue. Plaintiffs respectfully request the Court to issue a Summary Judgment on their behalf on three issues and to provide Plaintiffs with the following relief:

1. Cancel all the documents of August 25, 1988;

2. Determine that Defendant Robert Soltow has a mortgage on the subject property for the principal amount of loan #3, dated July 8, 1986, for $350,000 and that

no interest can accumulate on the $350,000 because of the prior usury;

3. That Plaintiff Richard Fishell individually in indebted to Defendant Robert Soltow as follows:

(a) $4,000 on loan #1, dated April 23, 1982. Said indebtedness is unsecured and no interest can accumulate on same; (80)

(b) $6,250 on loan #2, dated January 26, 1986. Said indebtedness is unsecured and no interest can accumulate on same;

(c) $55,000 on loan #6, dated March 24, 1988. Said indebtedness is unsecured and no interest can accumulate on same;

4. That Plaintiffs Richard and Dorothy Fishell are indebted to Defendant Robert Soltow as follows:

(a) $10,000 on loan #4, dated July 16, 1987. Said indebtedness is unsecured and no interest can accumulate on same;

(b) Plaintiffs Richard and Dorothy Fishell are indebted to Defendant Robert Soltow in the amount of $25,000 on loan #5, dated September 23, 1987. Said indebtedness is unsecured and no interest can accumulate on same;

5. That Defendants are barred from the recovery of any interest, any official fees, delinquency or collection charge, attorney's fees or court costs;

6. That Plaintiffs shall recover their attorney's fees and court costs from Defendants incurred in this litigation since its commencement in Eaton County Circuit Court on April 27, 1989;

7. Under the fraud and equitable mortgage issues, Plaintiffs would request all the above relief together with damages, including but not limited to those damages set forth in (81) the conclusion

section of the fraud issue, commencing on Page 57 and including paragraphs (1) through (5)(a) through (f). That Plaintiffs would offer proofs subsequent to the entry of summary judgment as to the amount of those damages;

8. The above relief would require the judgment or order of this Court cancelling the documents of August 25, 1988, to set aside the recorded deed, set aside the Affidavit of Douglas Austin dated February 7, 1989 and filed on the same day, and setting aside the recording of the mortgage modification agreement dated August 25, 1988;

9. Order Defendants to convey to Plaintiffs the Andre property that Defendant R. Soltow purchased at the foreclosure sale under the terms and conditions the Court determines to be equitable, taking into consideration Plaintiffs' claims for damages against Defendants. The Andre

property is necessary to the use of the subject property because the drainage for the subject property is across the Andre property. That was the reason for the Declaration of Storm Drain Easement on August 25, 1988 (Plaintiffs' Exhibit 21).

10. Plaintiffs respectfully request the Court to grant any additional relief that the Court feels equity and justice require.

Respectfully submitted,

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